Nos. 83-245, 83-291

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PENSION BENEFIT GUARANTY CORPORATION,
Appellant,

v.

R.A. GRAY & COMPANY,
Appellee.

OREGON-WASHINGTON CARPENTERS-EMPLOYERS PENSION TRUST FUND,
Appellant,

v.

R.A. GRAY & COMPANY,
Appellee.

On Appeal from the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR APPELLANT PENSION BENEFIT GUARANTY CORPORATION

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QUESTION PRESENTED

Whether, in enacting the Multiemployer Pension Plan Amendments Act of 1980, Congress could constitutionally provide that it take effect on a date prior to its enactment to prevent frustration of the law's rational purposes.

PARTIES TO THE PROCEEDING

The Pension Benefit Guaranty Corporation, appellant in No. 83-245, is a United States government agency created by 29 U.S.C. § 1302(a).

The Oregon-Washington Carpenters-Employers Pension Trust Fund, appellant in No. 83-291, is a multiemployer pension plan, as that term is defined in 29 U.S.C. § 1301(a)(3) (Supp. V 1981).

Appellee R.A. Gray & Co. is a building and construction firm doing business in Tigard, Oregon.*

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* This case was heard by the United States Court of Appeals for the Ninth Circuit together with other appeals raising similar and related issues. The parties in the other proceeding—who are also parties to No. 83-507, which is pending on Petition for a Writ of Certiorari—are: the Carpenters Pension Trust for Southern California, a multiemployer pension plan, petitioner in No. 83-507; and Shelter Framing Corporation and G&R Roofing Company, two California building and construction firms, respondents in No. 83-507.

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OPINIONS BELOW

The opinion of the court of appeals (reprinted in our Jurisdictional Statement, hereinafter "J.S.," App. A, pp. 1a-29a) is reported at 705 F.2d 1502. The opinion of the district court (J.S., App. B, pp. 30a-49a) is reported at 549 F. Supp. 531.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 1983. The Pension Benefit Guaranty Corporation (the "PBGC"), an agency of the United States gov-

ernment, filed a notice of appeal to this Court on June 15, 1983. The Oregon-Washington Carpenters-Employers Pension Trust Fund (the "Trust Fund") filed a notice of appeal to this Court on June 20, 1983. The PBGC filed its Jurisdictional Statement on August 15, 1983, and the Trust Fund filed its Jurisdictional Statement on August 19, 1983. This Court noted probable jurisdiction on October 17, 1983. The Court has jurisdiction under 28 U.S.C. § 1252 (1976). The district court had jurisdiction of this action under 29 U.S.C. § 1451(c) (Supp. V 1981).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), *as amended by* the Multiemployer Pension Plan Amendments Act of 1980 (the "Multiemployer Act"), 29 U.S.C. §§ 1001-1461 (1976 & Supp. V 1981), are set forth in the Appendix ("App.") 13a-74a.

STATEMENT

On September 26, 1980, following almost seventeen months of congressional consideration and debate, the President signed the Multiemployer Act into law. Among other things, the Act imposes liabilities on certain employers that withdraw from multiemployer pension plans. In this way, Congress sought to protect the financial stability of multiemployer plans and the retirement income security of millions of participants by ensuring that those employers that withdraw from such plans continue to fund their share of the plans' liabilities. The Act's withdrawal liability provisions (29 U.S.C. §§ 1381-1405 (Supp. V 1981)) were made effective as of April 29, 1980—almost one year after the bill was introduced in the Congress and less than five months prior to its adoption by the Congress and the President's signing. *Id.* § 1461(e)(2)(A).

The only issue on this appeal is whether the statutory withdrawal liability may constitutionally be assessed

against an employer that withdrew from a multiemployer plan [1] during the final weeks of the legislative process. The district court rejected the "retroactivity" challenge made by the appellee employer (J.S. 34a-43a), but the court of appeals held that "retroactive application of the [Multiemployer] Act violated the employers' rights to due process as guaranteed by the fifth amendment" (J.S. 27a). As background for our submission that the court of appeals erred, we outline briefly the history and purposes of the Multiemployer Act, as well as the undisputed record facts regarding the appellee's withdrawal from its multiemployer pension plan.

1. *Congress Prescribes Pension Insurance*

In 1974 Congress enacted the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1381 (1976), to provide comprehensive regulation for private pension plans. In addition to prescribing standards for the funding, management, and benefit provisions of private pension plans, ERISA established a system of pension benefit insurance. Substantial public concern had been expressed over tragedies suffered by thousands of American workers, whose expectations of receiving promised pensions had been shattered by the insufficient funding of their pension plans. *See, e.g.*, 1 *Legislative History of the Employee Retirement Income Security Act of 1974* (1976) (*"Leg. Hist."*) 212-214 (Sen. Bentsen). Perhaps the most notorious example involved the 1964 closing of the Studebaker plant in South Bend, Indiana. When the pension plan was terminated, its assets were insufficient to pay all claims. On distribution of the

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[1] A multiemployer plan is defined as a plan to which more than one employer is required to contribute, which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer, and which satisfies such other requirements as the Secretary of Labor may prescribe by regulation. 29 U.S.C. § 1301(a)(3) (Supp. V 1981). Approximately two thousand such plans provide pension coverage to eight million American workers and their families.

plan's assets, 4,000 employees between 40 and 60 years of age, with vested rights, received only 15 percent of their anticipated benefits. Approximately 2,900 employees under the age of 40—some of whom also had vested rights—received nothing. 1 *Leg. Hist.* at 214.

As a result of many such experiences, Congress made pension benefit insurance mandatory. ERISA's legislative findings state, *inter alia*, "that owing to the termination of the plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits" (29 U.S.C. § 1001(a) (1976)) and that it is the policy of the Act (*id.* § 1001(c))

> to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries . . . by requiring plan termination insurance.

Title IV of ERISA created the PBGC, a wholly-owned government corporation and a federal agency. Title IV of ERISA assigned to the PBGC the task of administering a program of insurance to cover the payment of certain pension benefits to participants in terminated plans. 29 U.S.C. § 1302(a) (1976). The 1974 law provided that if a pension plan subject to Title IV terminated with insufficient assets to provide "nonforfeitable" benefits guaranteed under 29 U.S.C. § 1322 (1976),[2] the

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[2] Under regulations promulgated by the PBGC, benefits are nonforfeitable under Title IV if

> on the date of termination of the plan the participant (or beneficiary) has satisfied all of the conditions required of him under the provisions of the plan to establish entitlement to the benefit, except the submission of a formal application, retirement, completion of a required waiting period, or death in the case of a benefit that returns all or a portion of a participant's accumulated mandatory employee contributions upon his or her death.

29 C.F.R. § 2613.6(a) (1981). This Court upheld the PBGC's construction of this term in *Nachman Corp.* v. *Pension Benefit Guar-*

PBGC would become responsible for the payment of such guaranteed benefits. *Id.* § 1361.

For a pension plan that was maintained by a single employer, the PBGC's obligation to pay guaranteed benefits was effective immediately. *Id.* § 1381.[3] The PBGC was required to collect any shortfall, subject to statutory limitations, from the employer that terminated an underfunded single-employer plan. *Id.* § 1362(b).

Under ERISA as enacted in 1974, however, guaranteed payment of multiemployer plan benefits was not to become mandatory until January 1, 1978. *Id.* § 1381(c)(1).[4] In the intervening period, the PBGC was authorized to determine on a case-by-case basis whether to pay benefits upon multiemployer plan termination. *Id.* § 1381(c)(2). If the PBGC exercised its discretion to pay guaranteed benefits, employers who had contributed to the plan during the five-year period preceding its termination were liable to the PBGC in amounts proportional to their shares of the plan's contributions during that period.

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anty Corp., 446 U.S. 359 (1980), *reh'g denied*, 448 U.S. 908 (1980). *See also* 29 U.S.C. § 1301(a)(8) (Supp. V 1981).

[3] More than 100,000 participants in terminated single-employer plans are now eligible to receive guaranteed benefit payments from the PBGC. PBGC, *Annual Report to the Congress FY 82* 6-7 (1983) (App. 2a).

[4] Mandatory payment was deferred because of Congress' uncertainty about the impact of termination insurance on multiemployer plans. *Hearings on the Multiemployer Pension Plan Amendments Act of 1979 before the Task Force on Welfare and Pension Plans of the Subcommittee on Labor-Management Relations of the Committee on Education and Labor, House of Representatives*, 96th Cong., 1st Sess. (1980) ("*House Labor Hearings*") 361 (Secretary of Labor Ray Marshall); *The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration, Committee on Labor and Human Resources, United States Senate*, 96th Cong., 2d Sess. 8 (Comm. Print 1980).

Id. § 1364. Thus, after the enactment of ERISA in 1974, any employer withdrawing from a continuing multiemployer plan had a contingent liability which depended upon whether the plan survived the next five years and on whether the PBGC assumed discretionary responsibility to pay the plan's guaranteed benefits.[5]

2. ***Congress Scrutinizes The Multiemployer Pension Benefit Insurance Program***

In 1977, Congress became concerned that the January 1, 1978 implementation of mandatory guarantees for multiemployer plans might induce several large multiemployer plans to terminate, subjecting the insurance system to a liability that would have "an adverse impact on the entire private pension system." 123 Cong. Rec. S18637 (daily ed. Nov. 3, 1977) (Sen. Bentsen). *See also* 126 Cong. Rec. S10099 (daily ed. July 29, 1980) (Sen. Javits). Congress directed the PBGC to prepare a comprehensive report analyzing the problems of multiemployer plans, and it delayed the effective date of the mandatory guarantees, extending the PBGC's discretionary authority through June 30, 1979. Pub. L. No. 95-214, 91 Stat. 1501 (Dec. 19, 1977) (App. 75a-76a).[6]

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[5] The PBGC has extended coverage to over 5,000 participants in several terminated multiemployer plans under the discretionary coverage program.

[6] The effective date for mandatory coverage of multiemployer plans was subsequently deferred to May 1, 1980 (Pub. L. No. 96-24, 93 Stat. 70 (June 19, 1979) (App. 77a)), to July 1, 1980 (Pub. L. No. 96-239, 94 Stat. 341 (Apr. 30, 1980) (App. 78a)), and to August 1, 1980 (Pub. L. No. 96-293, 94 Stat. 610 (June 30, 1980) (App. 79a)). In each instance the purpose was to provide more time for thorough congressional consideration of the PBGC's report and of subsequent legislative proposals. Mandatory coverage was ultimately superseded by the Multiemployer Act.

The PBGC's report, issued on July 1, 1978, included the following findings:[7]

1. ERISA covered approximately two thousand multiemployer pension plans with 8 million participants. *PBGC Study* 1, 20 (1155, 1174).

2. About ten percent of all multiemployer plans, covering 1.3 million participants, were experiencing financial difficulties that could result in plan terminations before 1988. *PBGC Study* 1, 138 (1155, 1290). Funding of all plan benefits under these plans, if they terminated, would cost the insurance system approximately 4.8 billion dollars, and necessitate an increase in premiums to unacceptable levels. *PBGC Study* 2, 16, 139 (1156, 1170, 1291).[8]

3. Existing law, if continued, would encourage the termination of multiemployer pension plans because ERISA limited the plans' authority to reduce benefits, and the availability of a PBGC guarantee made termination an attractive alternative whenever the cost of funding a plan became high and the industry was declining. *PBGC Study* 4, 24, 49, 51-52 (1158, 1178, 1203, 1205-06).[9]

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[7] The report (Pension Benefit Guaranty Corporation—Multiemployer Study Required by P.L. 95-214—July 1, 1978) was reproduced at pages 1149-1481, *House Labor Hearings, supra* note 4. It is cited herein as "*PBGC Study* — (—)," with the first number referring to the referenced page of the original study and the number in parentheses to the page of the volume of congressional hearings.

[8] The cost to the insurance system of funding all benefits guaranteed under the plans projected to become insolvent before 1988 could be approximately $560 million. The annual per capita premium needed to fund this liability could rise from fifty cents to as much as nine dollars. *PBGC Study* 2, 16, 140 (1156, 1170, 1292).

[9] The limitation of an employer's liability to 30 percent of its "net worth," 29 U.S.C. § 1362(b)(2) (1976), was also an incentive for employers to terminate their plans rather than to continue funding them. *See PBGC Study* 51 (1205); 126 Cong. Rec. S11668 (daily

The greatest threat to the solvency and stability of existing multiemployer pension plans was employer withdrawals—*i.e.*, employers' termination of participation in their plans. The PBGC's Executive Director explained the problem to Congress as follows (*Pension Plan Termination Issues: Hearing Before the Subcommittee on Oversight of the House Committee on Ways and Means*, 95th Cong., 2d Sess. 22 (1978)):

> A key problem of ongoing multiemployer plans, especially in declining industries, is the problem of employer withdrawal. Employer withdrawals reduce a plan's contribution base. This pushes the contribution rate for remaining employers to higher and higher levels in order to fund past service liabilities, including liabilities generated by employers no longer participating in the plan, so-called inherited liabilities. The rising costs may encourage—or force—further withdrawals, thereby increasing the inherited liabilities to be funded by an ever-decreasing contribution base. This vicious downward spiral may continue until it is no longer reasonable or possible for the pension plan to continue.

The PBGC Study, as described by the Executive Director, had proposed a mechanism to remedy this situation (*id.* at 23):

> To deal with this problem, our report considers an approach under which an employer withdrawing from a multiemployer plan would be required to complete funding its fair share of the plan's unfunded liabilities. In other words, the plan would have a claim

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ed. Aug. 26, 1980) (Sen. Javits); H.R. Rep. No. 869, Part II, 96th Cong., 2d Sess. 10, *reprinted in* 1980 U.S. Code Cong. & Ad. News 3001. An employer's low net worth may not accurately reflect its capacity to meet its funding obligations. *See* Report to the Congress by the Comptroller General of the United States, *Legislative Changes Needed to Financially Strengthen Single Employer Pension Plan Insurance Program* 42-44 (Nov. 14, 1983) (30% net worth limitation enables employers to "take advantage of" the single-employer insurance system) (App. 8a-12a).

against the employer for the inherited liabilities which would otherwise fall upon the remaining employers as a result of the withdrawal. Of course, where a withdrawal is caused by employer bankruptcy, the plan would probably have to absorb the costs that cannot be paid out of the employer's assets.

We think that such withdrawal liability would, first of all, discourage voluntary withdrawals and curtail the current incentives to flee the plan. Where such withdrawals nonetheless occur, we think that withdrawal liability would cushion the financial impact on the plan.[10]

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[10] "The committee believes that . . . present law provides an undesirable incentive for employers to withdraw from plans and an unfair burden on the employers who continue to maintain the plans." H.R. Rep. No. 869, Part II, 96th Cong., 2d Sess. 10, *reprinted in* 1980 U.S. Code Cong. & Ad. News 3001. "Under the current rules, when a contributor to a multiemployer plan withdraws from the plan, its share of the funding burden must be picked up by the remaining employers. Thus withdrawals contribute to the escalation of contribution rates and unfairly burden remaining contributors with unfunded benefit obligations left behind by the withdrawn employer." H.R. Rep. No. 869, Part I, 96th Cong., 2d Sess. 60, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2928. "Generally the question is whether an employer withdrawing from the plan pays a share of the total unfunded benefits or whether the employer[s] who stay in the plan pick up this liability. Current law provides that the remaining employers pick up the liability and, generally, the bill forces withdrawing employers to pay their share." 126 Cong. Rec. S10103 (daily ed. July 29, 1980) (Sen. Dole).

Indeed, several employer associations testified before Congress in support of withdrawal liability. *See, e.g., Pension Plan Termination Insurance for Multiemployer Pension Plans, Hearing Before the Subcommittee on Private Pension Plans and Employee Fringe Benefits of the Committee on Finance, United States Senate*, 96th Cong., 2d Sess. (1980) ("*Senate Finance Hearing*") 155 (National Construction Employers Council); *id.* 215 (Food Marketing Institute); *see also id.* 281 (Bituminous Coal Operators Association).

See also House Labor Hearings, supra note 4, at 481-482 (Secretary of Labor Marshall); *Multiemployer Pension Plan Amendments Act of 1979: Hearings Before the Committee on Labor and Human Resources, United States Senate*, 96th Cong., 1st Sess. (1979) ("*Senate Labor Hearings*") 123-124 (Secretary of Labor Marshall).

In light of the PBGC's warnings, Congress debated the consequences of employer withdrawals from multiemployer pension plans, particularly in declining industries. *See, e.g.*, H.R. Rep. No. 869, Part I, 96th Cong., 2d Sess. 63 (1980); 126 Cong. Rec. S10113-14 (daily ed. July 29, 1980) (Joint Explanation of S.1076: Multiemployer Pension Plan Amendments Act of 1980). Congress recognized that the absence of effective withdrawal liability permitted an employer to "withdraw from a plan leaving unfunded benefit obligations for his employees which must be paid by the remaining employers in the plan," and encouraged a "'last man out' mentality, with employers withdrawing from plans to avoid possible plan termination liability." *Id.* at S10100 (Sen. Javits).

3. *A Bill Is Proposed And Considered By Congress*

The PBGC submitted legislative recommendatio . to Congress on February 27, 1979. *Id.* at S10131 (Sen. Javits). Those recommendations were incorporated in an Administration bill that was formally sent to Congress on May 3, 1979. The original bill contained an effective date for employer withdrawal liability of February 27, 1979 —the date of the PBGC's submission of its recommendations. This was designed to prevent employers from taking advantage of "the lenient rules in [then] current law" by withdrawing while the legislation was under consideration. *Id.* at S10156 (Sen. Matsunaga).[11]

Congress thereafter studied and revised the Administration's proposal. Four separate congressional committees held hearings on the bill, and numerous witnesses testified.[12] By April 29, 1980, substantially identical bills had

[11] See also *House Labor Hearings, supra* note 4, at 788 (June 5, 1979 statement of Bert Seidman, Director, Department of Social Security, AFL-CIO).

[12] *House Labor Hearings, supra* note 4; *Senate Labor Hearings, supra* note 10; *Senate Finance Hearing, supra* note 10; *Multiemployer Pension Plan Termination Insurance Program: Hearing Be-*

been approved by two committees in the House and one in the Senate.[13] All contained the originally suggested effective date for withdrawal liability. When the Senate Finance Committee, the last of the four congressional committees responsible for the legislation, indicated it needed more time, Congress delayed the mandatory payment of multiemployer plan benefits provided in ERISA from May 1 to July 1, 1980. Pub. L. No. 96-239, 94 Stat. 341 (Apr. 30, 1980). The Finance Committee stressed, however, that it did not want to encourage employers to withdraw from multiemployer plans while additional work was being done on the bill. Senator Bentsen, who was chairman of the Subcommittee on Private Pension Plans, said on the Senate floor on April 29, 1980 (126 Cong. Rec. S4302-03 (daily ed.)):

> The feeling of the Senate Finance Committee was that this bill should not encourage employers to withdraw from a multiemployer plan between now and July 1, 1980. Any withdrawals after April 28, 1980, will be covered by any withdrawal liability rules that the committee might adopt.

The Finance Committee amended the bill to move the effective date for withdrawal liability to April 29, 1980, in order to avoid imposing liability on certain employers

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fore the Subcommittee on Oversight of the Committee on Ways and Means, House of Representatives, **96th Cong., 1st Sess. (1979) ("*1979 House Ways and Means Hearing*"); *The Multiemployer Pension Amendments Act of 1979: Hearing Before the Committee on Ways and Means, House of Representatives,* 96th Cong., 2d Sess. (1980) ("*1980 House Ways and Means Hearing*").**

[13] The Senate Committee on Labor and Human Resources approved a bill on March 24, 1980. 126 Cong. Rec. D414 (daily ed.). The House Committee on Education and Labor reported its bill on April 2, 1980. 126 Cong. Rec. H2489 (daily ed.) (Rep. Perkins). The House Committee on Ways and Means amended that bill and reported its version on April 23, 1980. 126 Cong. Rec. H2879 (daily ed.) (Rep. Ullman). All of the above approved versions of the bill contained an effective date of February 27, 1979.

"that had been caught by the earlier date." *Id.* at S10101 (daily ed. July 29, 1980) (Sen. Javits). Testimony before the Finance Committee in February 1980 had suggested that the original effective date of February 27, 1979, had been unfair to such employers. One employer urged the House Ways and Means Committee and the Senate Finance Committee that it was inequitable to impose liability on a partial withdrawal "which was publicly announced and commenced prior to the introduction of the substantive provisions regarding partial withdrawal liability." The employer asserted that it had "acted in complete good faith on the basis of the state of the law and general public knowledge at the time." *Senate Finance Hearing, supra* note 12, at 173; *see also 1980 House Ways and Means Hearing, supra* note 12, at 111.

4. *Congress Adopts The Multiemployer Act*

On May 22, 1980, the House passed by a vote of 374-0 its version of the bill, containing the original February 27, 1979 effective date for withdrawal liability. 126 Cong. Rec. H4170 (daily ed.). After a further postponement of the mandatory guarantee program to August 1, 1980, Pub. L. No. 96-293, 94 Stat. 610 (June 30, 1980), the Senate passed its version by a vote of 85-1 on July 29, 1980. 126 Cong. Rec. S10169 (daily ed.). The Senate adopted the April 29, 1980 effective date for the withdrawal liability provisions, having concluded that "the original purpose of a retroactive date—namely to avoid encouragement of employer withdrawals while the bill was being considered—ha[d] been achieved." *Id.* S10101 (Sen. Javits).[14] The conference committee accepted the

[14] **Despite the apparently limited impact of this change, several Senators felt strongly that the change was inequitable, because it permitted employers who had withdrawn between February 27, 1979 and April 28, 1980 to escape their funding responsibilities and transfer them to remaining employers. 126 Cong. Rec. at S10156 (daily ed. July 29, 1980) (Sen. Matsunaga); *id.* at S10101 (Sen. Javits). Indeed, the Multiemployer Act provided that withdrawals from one particular plan would be subject to withdrawal liability**

Senate's effective date, and the President signed the Multiemployer Act into law on September 26, 1980.[15]

5. *Gray Withdraws From Its Pension Plan*

The Trust Fund was established with a Trust Agreement dated December 19, 1962, which was amended on August 1, 1968 (Joint Appendix, hereinafter "J.A.", 111) and several times thereafter (J.A. 113). The Fund is administered pursuant to a "Revised Pension Plan" (J.A. 116), which took effect on July 1, 1976 (J.A. 90), and has been amended six times since that date (J.A. 98).

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if they had occurred after May 3, 1979. 29 U.S.C. § 1381 note (Supp. V 1981). Debate in the Senate demonstrated that permitting employers who had withdrawn from the plan during Congress' deliberations to escape mandatory liability would impose substantial new funding burdens on remaining employers. 126 Cong. Rec. at S10156-58 (Sen. Matsunaga).

[15] In addition to imposing withdrawal liability (29 U.S.C. § 1381 (Supp. V 1981)) on certain employers that withdraw from multiemployer plans (*id.* § 1383), the Multiemployer Act made other changes in ERISA. Among the principal revisions were (1) a reduction in the level of benefits guaranteed by the PBGC (*id.* §§ 1322a, 1322b), to discourage reliance on plan termination and the PBGC guarantee; (2) authorization to plan sponsors to reduce benefits in certain circumstances and to suspend payments when funds are unavailable (*id.* §§ 1425, 1426); (3) an increase in the annual per capita premium paid by multiemployer plans to $1.40, with further increases to $2.60 authorized over a nine-year period (*id.* § 1306); (4) reduction of the time period over which benefits provided by multiemployer plans must be funded (*id.* § 1082; 26 U.S.C. § 412), in order to protect the insurance system, participants, and remaining employers; and (5) authorization to the PBGC to provide financial assistance to insolvent plans, even if they have not been terminated, thereby allowing employers to continue contributions to an insolvent plan without incurring liability (29 U.S.C. § 1431 (Supp. V 1981)). Two plans with over 10,000 participants have received loans from the PBGC under the Multiemployer Act's insolvency insurance program.

The Pension Plan is a multiemployer "defined benefit" plan within the meaning of 29 U.S.C. § 1301(a)(3) (Supp. V 1981) (J.A. 6, 103, 129). It is a "building and construction industry plan" within the meaning of 29 U.S.C. § 1383(b)(1) (Supp. V 1981) (J.A. 6, 103-04, 129, 132). The Trust Agreement specifies that the Trust Fund is to be administered by a ten-member board of trustees, of whom five are to represent employers and the other five to represent employees (J.A. 120).

The appellee, R.A. Gray & Co. ("Gray"), is a construction employer that has entered into collective bargaining agreements with the Oregon State Council of Carpenters (J.A. 16-18). Pursuant to these agreements, Gray contributed to the Pension Plan to finance pension benefits provided under the Revised Pension Plan (J.A. 1, 2, 14, 104). The Carpenters Master Labor Agreement was executed by the Oregon-Columbia Chapter of the Associated General Contractors of America, Inc. (an employer association) and by the Oregon State and Southwest Washington District Councils of the United Brotherhood of Carpenters and Joiners of America (a national union) (J.A. 17), and adopted by Gray (J.A. 16).

In February 1980, Gray advised the Oregon State Council of Carpenters that it would be terminating its collective bargaining agreement effective June 1, 1980 (J.A. 19). Correspondence over new proposals for a labor contract ensued (J.A. 105, 156, 159, 160). Gray proposed to change pension and vacation benefits (J.A. 160). No agreement was reached, and Gray unilaterally implemented its proposals "without prejudice to such agreement as future negotiations may produce" (J.A. 160). Gray withdrew by ceasing to contribute to the Plan while continuing to engage in the building and construction industry in competition with contributing employers (J.A. 9, 105, 143, 153-54, 154-55). *See* 29 U.S.C. § 1383(b) (Supp. V 1981).

6. *The Pension Plan Assesses Withdrawal Liability*

Pursuant to 29 U.S.C. §§ 1382 and 1399(b)(1) (Supp. V 1981), the Pension Plan notified Gray in a letter dated July 24, 1981, that Gray was deemed to have withdrawn from the Pension Plan as of June 1, 1980, and that it had incurred a withdrawal liability of $201,359 (J.A. 8-12). The notice set out a schedule of quarterly payments and demanded payment in accordance with that schedule (J.A. 12).

Gray then requested additional information, which the Pension Plan provided (J.A. 22-23, 25-33). However, Gray did not begin payments in accordance with the schedule (J.A. 7). In a letter dated September 25, 1981, the Pension Plan informed Gray that it was delinquent in its payments and that it would be in default if payment were not made within 60 days (J.A. 20, 34).

7. *Gray Litigates Its Liability*

Gray filed suit for declaratory and injunctive relief against the Pension Plan and the PBGC on September 29, 1981 (J.A. 1-5). In its early pleadings, Gray challenged the withdrawal liability provisions of the Multiemployer Act on constitutional grounds (J.A. 3-4) and asserted, as well, that it had not "withdrawn" from the Pension Plan (J.A. 2-3). Subsequently, Gray asserted that the liability determination was erroneous (J.A. 35, 41). Gray's request for a preliminary injunction was denied by the district court, which concluded that the issue of Gray's withdrawal was particularly suitable for the statutory arbitration remedy (J.A. 55). Gray thereafter expressly waived its right to seek arbitration (*see* 29 U.S.C. § 1401(a)(1)(A) (Supp. V 1981)) and accepted the Pension Plan's findings, including its determination that Gray had withdrawn (J.A. 162).[16]

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[16] In response to Gray's request for review, the Plan had issued its "Decision on Review," pursuant to 29 U.S.C. § 1399(b)(2)(B) (Supp. V 1981) (J.A. 142-161).

The district court then considered Gray's constitutional claim, which included an attack on the retroactive provision of the Multiemployer Act involved in this appeal as well as Gray's more general challenge to employer withdrawal liability. The district court found the Multiemployer Act to be constitutional in all respects and granted the defendants' motions for summary judgment (J.S. 49a, J.A. 166).

The Ninth Circuit heard Gray's appeal on December 7, 1982.[17] The court of appeals reversed the district court on the ground that the April 29, 1980 effective date for withdrawal liability was an unconstitutional denial of due process of law (J.S. 27a, 50a).

SUMMARY OF ARGUMENT

The issue in this case is whether the Constitution bars congressional legislation regulating pre-enactment conduct that could thwart the legislation's objectives. It is not a case in which Congress has attempted, with a new law, to impose unanticipated economic consequences on commercial transactions that had been concluded long before the law was contemplated, introduced or debated. Congress acted prospectively so as to affect those employers who might, in the future, terminate their participation in federally insured multiemployer pension plans. Recognizing, however, that the public process of legislation takes time, Congress was concerned that employers might race to alter their existing legal relationships so as to avoid the remedial impact of the new law. In order to prevent that consequence, Congress selected a date—long after the proposed legislation was introduced and after it had been substantially debated—as the effec-

[17] The court heard at the same time the appeals in *Shelter Framing Corp.* v. *Carpenters Pension Trust for Southern California* and *G&R Roofing Co.* v. *Carpenters Pension Trust for Southern California*, as well as the PBGC's appeals of the district court's denials of motions by the PBGC to intervene in those cases. J.S. 1a.

tive starting point for the crucial remedial provision of the law. Although this date was earlier than the formal enactment of the law and preceded by almost five months the President's signing of the bill, it was a reasonable and fair means of forestalling a flood of withdrawals during the final stages of the legislative process which would have robbed the new law of its intended remedial impact.[18]

[18] The Fourth Circuit and a majority of district courts have upheld the retroactive application of the Multiemployer Act. *See Republic Industries, Inc.* v. *Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d 628 (4th Cir.), *affirming* 3 Employee Benefits Cases ("EBC") (BNA) 2545 (E.D. Va. 1982), *petition for cert. filed*, 52 U.S.L.W. 3293 (U.S., Sept. 29, 1983) (No. 83-541); *Bakersfield Concrete Constr., Inc.* v. *Construction Laborers Pension Trust*, 4 EBC 1425 (C.D. Cal. 1983); *Board of Trustees of the Western Conference of Teamsters Pension Trust Fund* v. *J.N. Ceazan*, 559 F. Supp. 1210 (N.D. Cal.), *appeal docketed*, No. 83-1095 (9th Cir., Apr. 22, 1983); *Coronet Dodge, Inc.* v. *Speckmann*, 553 F. Supp. 518 (E.D. Mo. 1982), *appeal stayed*, No. 82-2554-EM (8th Cir., Nov. 7, 1983); *Pacific Iron & Metal Co.* v. *Western Conference of Teamsters Pension Trust Fund*, 553 F. Supp. 523 (W.D. Wash.), *appeal docketed*, No. 82-3634 (9th Cir., Nov. 18, 1982); *Peick* v. *PBGC*, 539 F. Supp. 1025 (N.D. Ill. 1982), *argued*, No. 82-2081 (7th Cir., Apr. 13, 1983); *R.A. Gray & Co.* v. *Oregon-Washington Carpenters-Employers Pension Trust Fund*, 549 F. Supp. 531 (D. Ore. 1982) (J.S. 41a); *Speckmann* v. *Paddock Chrysler Plymouth, Inc.*, 565 F. Supp. 469 (E.D. Mo.), *appeal stayed*, No. 83-1881-EM (8th Cir. Nov. 7, 1983); *Textile Workers Pension Fund* v. *Standard Dye & Finishing Co.*, 549 F. Supp. 404 (S.D.N.Y. 1982), *argued*, No. 83-7004 (2d Cir., Oct. 3, 1983); *Transport Motor Express, Inc.* v. *Central States, Southeast & Southwest Areas Pension Fund*, 4 EBC 1566 (N.D. Ill.), *argued*, No. 83-2026 (7th Cir., Aug. 10, 1983). *But see D.J. Drywall, Inc.* v. *Orange Belt Painters Pension Fund*, No. CV-81-5330-RJK (C.D. Cal., June 29, 1983); *Grano Steel Corp.* v. *Shopmen's Ironworkers Pension Plan*, No. CV-5862-LEW (C.D. Cal., Nov. 5, 1982), *appeal docketed*, 82-6090 (9th Cir., Dec. 15, 1982); *National Steel Serv. Center, Inc.* v. *Central States, Southeast & Southwest Areas Pension Fund*, No. 82-C-5315 (N.D. Ill., Nov. 23, 1983); *Republic Industries, Inc.* v. *New England Teamsters & Trucking Pension Fund*, Nos. 81-2551-S, -2703-S, -2738-S (D. Mass., Aug. 3, 1983), *appeals stayed*, Nos. 83-1657, -1658 (1st Cir., Dec. 1, 1983); *Robertson's Linen Serv.* v. *Central States, Southeast &*

Our argument on the constitutionality of the law addresses first the correct constitutional standard by which the Multiemployer Act must be evaluated. We show that this Court held in 1976 that retroactive federal laws

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Southwest Areas Health & Welfare & Pension Fund, No. 81-74350 (E.D. Mich., Aug. 30, 1983); *Shelter Framing Corp.* v. *Carpenters Pension Trust for Southern California*, 543 F. Supp. 1234 (C.D. Cal. 1982), *aff'd*, 705 F.2d 1502 (9th Cir.), *petition for cert. filed*, 52 U.S.L.W. 3268 (Sept. 24, 1983) (No. 83-507); *Sibley, Lindsay & Curr Co.* v. *Bakery Workers Int'l Union*, 566 F. Supp. 32 (W.D.NY.), *argued*, No. 83-7328 (2d Cir., Oct. 3, 1983); *Warner-Lambert Co.* v. *United Retail & Wholesale Employee's Teamster Local No. 115 Pension Fund*, No. 82-1080 (E.D. Pa., Aug. 10, 1983), *appeals stayed*, Nos. 83-1676, -1682 (3d Cir., Nov. 7, 1983).

The Act's prospective operation has been unanimously upheld by the district courts that have considered it. *Board of Trustees of Western Conference of Teamsters Pension Trust Fund* v. *Westside Bldg. Materials Corp.*, No. 82-6029KN (N.D. Cal., Aug. 17, 1983), *appeal docketed*, No. 83-6207 (9th Cir., Sept. 12, 1983); *Cleveland Metal Prods. Co.* v. *Teamster Local No. 507 Pension Fund*, No. C81-2543 (N.D. Ohio, June 9, 1983), *appeal dismissed*, No. 83-3581 (6th Cir., Dec. 5, 1983); *Eberhard Foods, Inc.* v. *RSEU & Food Employers Joint Pension Fund*, 4 EBC 1544 (W.D. Mich.), *appeal dismissed*, No. 83-1424 (6th Cir., Aug. 1, 1983); *IAM Nat'l Pension Fund* v. *Dormont Oldsmobile Co.*, No. 82-1737 (D.D.C., June 21, 1983); *IUE Pension Fund* v. *Erie Universal Prods. Corp.*, 4 EBC 1357 (D.N.J. 1983); *Kinsora* v. *Vornado, Inc.*, No. 82-1034 (D.N.J., Mar. 28, 1983), *appeal dismissed*, No. 83-5440 (3d Cir., Aug. 17, 1983); *Peick* v. *PBGC*, 539 F. Supp. 1025 (N.D. Ill. 1982), *argued*, No. 82-2081 (7th Cir., Apr. 13, 1983); *Penn Elastic Co.* v. *United Retail & Wholesale Employees Union, Teamster Local No. 115 Pension Fund*, No. 82-777 (E.D. Pa., Sept. 28, 1983); *S&M Paving, Inc.* v. *Construction Laborers Pension Trust of Southern California*, 539 F. Supp. 867 (C.D. Cal. 1982); *Spector Red Ball, Inc.* v. *PBGC*, No. SA-83-CA-178 (W.D. Tex., Aug. 12, 1983), *appeal docketed*, No. 83-1621 (5th Cir., Sept. 6, 1983); *Stoeven Bros., Inc.* v. *California Butchers' Pension Trust Fund*, No. C-82-0558 RFP (N.D. Cal., Sept. 15, 1983); *Terson Co.* v. *Bakery Drivers Local 194 Pension Fund*, 4 EBC 2024 (D.N.J.), *appeal docketed*, No. 83-5655 (3d Cir., Sept. 7, 1983); *Trustees of Retirement Fund of Fur Mfg. Industry* v. *Lazar-Wisotzky, Inc.*, No. 82-CIV-0880(LBS)

which change "settled expectations" based on private commercial contracts are constitutional if it was "rational" for Congress to prescribe retroactivity. The court of appeals failed to apply this rationality standard. Instead, it substituted its own judgment for Congress' on several questions of legislative policy. Since Gray cannot meet its burden of showing that Congress' selection of a retroactive effective date was "arbitrary and irrational," the Multiemployer Act must be upheld.

In addition, the court of appeals mistakenly employed standards and precedents which are applicable only in deciding whether state legislation violates the Contract Clause of Article I, Section 10 of the Constitution. That clause is wholly inapplicable to federal legislation, which, under authoritative decisions of this Court, may constitutionally override private contractual agreements.

We do not, however, rest merely on the negative proposition that the retroactivity of the Multiemployer Act has not been shown to be irrational. We demonstrate in the second portion of this brief that there was an overriding need to make the Act effective before it was finally approved by Congress and the President. Certain federal laws may be rendered meaningless if private parties are able to escape the laws by taking unilateral action before the laws are formally adopted. In the present case, if employers could have escaped the law before it was enacted, they would thereby have transferred the responsibility for funding benefits earned by their former employees to other employers—the very harm the law was

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(S.D. N.Y., May 3, 1983) (memorandum endorsement of interlocutory opinion at 550 F. Supp. 35), *appeal docketed*, No. 83-7585 (2d Cir., Oct. 24, 1983); *Victor Constr. Co.* v. *Construction Laborers Pension Trust*, 3 EBC 1763 (C.D. Cal. 1982), *appeal stayed*, No. 82-5701 (9th Cir., Sept. 30, 1983); *Warner-Lambert Co.* v. *United Retail & Wholesale Employee's Teamster Local No. 115 Pension Fund*, No. 82-1080 (E.D. Pa., Aug. 10, 1983), *appeals stayed*, Nos. 83-1676, -1682 (3d Cir., Nov. 7, 1983); *Washington Star Co.* v. *International Typographical Union Negotiated Pension Plan*, 4 EBC 1145 (D.D.C.), *appeal docketed*, No. 83-1313 (D.C. Cir., Mar. 28, 1983).

designed to prevent. Consequently, the justification for retroactivity is great, and the constitutionality of this law is supported by judicial decisions upholding similar retroactivity in analogous circumstances.

Moreover, there can be no real doubt that Gray should have been on notice that its withdrawal, even if occurring prior to formal adoption of the law, could result in liability. For six years, ERISA had imposed liability on employers beyond bargained obligations. Gray had more than two years' notice that Congress was concerned with the adequacy of ERISA's regulation of multiemployer plans. Retroactivity was a feature of the Multiemployer Act from the date it was first introduced. Gray's withdrawal occurred long after the bill's initial introduction, and after the full House of Representatives and a Senate committee had approved the bill. Under these circumstances, Gray cannot successfully claim that the law was applied without prior notice.

ARGUMENT

I. THE "RETROSPECTIVE ASPECTS" OF THE MULTIEMPLOYER ACT SATISFY THE CONSTITUTIONAL TEST OF RATIONALITY

A. This Court Has Prescribed A "Rationality" Standard To Test The Constitutionality Of Retroactive Provisions Of Statutes Affecting Only Economic Interests

The law at issue is among Congress' "legislative Acts adjusting the burdens and benefits of economic life." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). It deals exclusively with a financial issue—who, if anyone, is to be responsible for the payment of money that is legally and morally due under pension plans on which employees have justifiably relied. With adoption of the Multiemployer Act's amendments to ERISA, Congress has arrived at a mechanism that distributes the

burden of paying expected benefits to participants, at least at statutorily guaranteed levels, among employers that remain in a plan, those who withdraw, and premium payers in other plans. The Multiemployer Act's amendments increased the burden on withdrawing employers, to make guarantees feasible and to distribute liability more equitably. While considering this change, Congress had to face the possibility that employers would withdraw from plans before the Act's provisions came into effect. To discourage opportunistic withdrawals, Congress made the withdrawal liability provisions effective for a limited period prior to enactment.

This allocation of economic responsibility amply satisfies the governing standard announced in this Court's decisions. In *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. at 16-19, this Court held that "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations" and that "[t]his is true even though the effect of the legislation is to impose a new duty or liability based on past acts." The Court went on to rule that the constitutionality of "retrospective aspects of legislation" is determined by whether they amount to "a rational measure" by which to spread societal costs. This Court refused in *Turner Elkhorn* independently to "assess the wisdom of Congress' chosen scheme." The applicable constitutional rule, which controls this case as well, was stated as follows (428 U.S. at 19):

> It is enough to say that the Act approaches the problem of cost spreading rationally; whether a broader cost-spreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension.

The imposition of withdrawal liability upon employers withdrawing from multiemployer pension plans and the decision to make such liability effective as of a time when it appeared that the law would pass were eminently ra-

tional legislative choices. In rejecting Congress' legislative determination, the court below simply substituted its own judgment for Congress'. Examination of the grounds enumerated by the court of appeals to justify its finding of unconstitutionality reveals that none of them relates to the rationality—as contrasted with the wisdom—of Congress' decision to make withdrawal liability effective as of April 29, 1980.

First, the court of appeals found that the retroactive imposition of withdrawal liability was unjustified because the liability of the three employers before the court was "relatively insignificant in terms of the plans' total unfunded vested benefits liability" (J.S. 20a). Congress, however, was concerned about the *cumulative* impact of withdrawals, and this concern was plainly rational. In ignoring this concern, the court not only disagreed with Congress' judgment, but also failed to assess the rationality of that judgment.

Second, the court of appeals concluded that "the equities weigh against retroactive application" (J.S. 26a). However, an Act of Congress does not contravene the Due Process Clause "merely because it is deemed in a particular case to work an inequitable result." *Wickard* v. *Filburn*, 317 U.S. 111, 129-30 (1942).

Third, the court below believed that the Multiemployer Act made "drastic legislative changes" in degree and kind in existing law (J.S. 21a, 22a). In *Turner Elkhorn*, this Court upheld a law which imposed new, unanticipated, and significant monetary liabilities. After *Turner Elkhorn*, it is clear that analysis of retroactive economic legislation must focus solely on its rationality, and not on whether less "drastic" changes would have been "wiser or more practical under the circumstances." The same failure to observe the standards of *Turner Elkhorn* is manifested in the speculation of the court below that "[o]ther legislative programs would have served the same purpose of ensuring financially healthy multiemployer plans"

(J.S. 25a). Such a judicial inquiry was precisely what this Court rejected as "not a question of constitutional dimension" in *Turner Elkhorn*, 428 U.S. at 19.

Fourth, the court below believed that the frustration of employers' reliance on existing law was unjustified because "[i]t was not certain at the time they withdrew that the [Multiemployer] Act would be enacted and would have a retroactive effect" (J.S. 19a). Inasmuch as certainty is not a feature of the legislative process, no law with a retroactive effective date would be constitutionally permissible under the standard adopted by the court below. Moreover, because the court adopted the wrong standard, it failed to consider whether Congress might rationally have concluded that sufficient notice of probable enactment had been provided by April 29, 1980, to justify treating employers who withdrew after that date in the same manner as employers who withdrew after enactment. *See infra* pp. 35-40.

Finally, the court below undertook to appraise the adequacy of the "moderating provisions" of the Multiemployer Act (J.S. 26a-27a). Such an appraisal is applicable, if at all, only in a Contract Clause analysis, and does not address the rationality of the law's retrospective effect, but only its wisdom.

In summary, the *rationality* of the selection of April 29, 1980, as the effective date for withdrawal liability for multiemployer plans has not been successfully challenged. Only the *wisdom* of the statutory provision has been questioned by the court below. Under the governing standard of the *Turner Elkhorn* case, the judgment must be reversed.[10]

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[10] The lower court's disagreements with Congress serve only to illustrate the wisdom of judicial deference to legislative decisions. For example, in espousing variations on contingent termination liability (J.S. 25a), the court below ignored Congress' finding that such contingent liability was an *incentive*, not a deterrent, to em-

B. Contract Clause Standards Do Not Apply To Federal Enactments

Another fundamental error of the court of appeals was its invocation of constitutional principles which have been developed by this Court under the Contract Clause of Article I, Section 10 of the Constitution. Specifically, the court below concluded that the "great deference" which the *Turner Elkhorn* decision required judges to accord to Congress' judgment in allocating economic benefits and burdens had been "restricted" by this Court's ruling in *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978), a Contract Clause case (J.S. 23a-24a). On this basis, and on the authority of *Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U.S. 330 (1935), the court of appeals struck down the pre-enactment effective date of the Multiemployer Act (J.S. 22a-24a).

In so doing, the court overlooked the well-established principle that the Contract Clause applies only to *state* legislation and not to federal law. *See Tidal Oil Co.* v. *Flanagan*, 263 U.S. 444 (1924).[20] The constitutional de-

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ployer withdrawal. H.R. Rep. No. 869, Part I, 96th Cong., 2d Sess. 60, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2928.

Similarly, in its consideration of the equities (J.S. 22a-26a), the lower court ignored the congressionally identified interests of employers remaining in pension plans, which can be adversely affected by even a single employer's withdrawal. *See, e.g., supra* note 10. The court also ignored the congressional concern that employer withdrawals can cause harm to a pension plan even if the plan does not actually terminate. *See* 29 U.S.C. § 1001a(a)(4)(A) (Supp. V 1981).

In the same vein, the court compared the moderating provisions available under the Multiemployer Act unfavorably to those previously available under ERISA (J.S. 26a-27a). In so doing, the court simply ignored congressional and administrative findings that the 30 percent "net worth" limitation was an incentive for termination, and thus was one of the very causes of the problem Congress sought to remedy in the Multiemployer Act. *See supra* note 9.

[20] See also the discussion in Justice Brennan's dissenting opinion in *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. at 256-57.

bates of the Framers leave no doubt whatever on this score. An effort to subject federal legislation impairing private contracts to the same constitutional strictures as the action of state legislatures was rejected during the constitutional debates (5 *Elliot's Debates* 546 (2d ed. 1845) (App. 1a)):

> MR. GERRY entered into observations inculcating the importance of public faith, and the propriety of the restraint put on the states from impairing the obligation of contracts; alleging that Congress ought to be laid under the like prohibitions. He made a motion to that effect. He was not seconded.

By contrast, other enumerated governmental conduct which Article I, Section 10 barred to the states, such as bills of attainder, *ex post facto* laws, and grants of nobility, were also barred to the federal government by Article I, Section 9. Impairment of contracts was *not* included in Article I, Section 9.

The constitutional rule governing federal laws which impair private contracts was stated by this Court in *Turner Elkhorn*, 428 U.S. at 15:

> [T]his Court long ago upheld against due process attack the competence of Congress to allocate the interlocking economic rights and duties of employers and employees . . . regardless of contravening arrangements between employer and employee.

This is the standard that has been uniformly applied by this Court and lower federal courts. In *Philadelphia, Baltimore & Washington Railroad* v. *Schubert*, 224 U.S. 603 (1912), for example, the Court ignored the Contract Clause in deciding whether a federal law nullifying "any contract . . . or device" limiting or exempting the liability of a common carrier for injuries sustained by employees on the job was constitutional. When the employee in that case was injured and discovered that the contractual compensation he received did not fully compensate him, he sued under the federal statute. This

Court rejected the railroad's claim that its "liberty of contract" was violated by the federal law observing "that if Congress possesses the power to impose . . . liability, . . . it also possesses the power to insure its efficacy by prohibiting any contract . . . in evasion of it." *Id.* at 610.[21]

Other cases in which this Court has upheld federal statutes abridging private contract rights under the traditional due process test of rationality, with no mention of the Contract Clause, include *Lichter* v. *United States*, 334 U.S. 742 (1948) (wartime contract providing excess profits); *Norman* v. *Baltimore & Ohio Railroad*, 294 U.S. 240 (1935) (gold clause in private agreements); *Calhoun* v. *Massie*, 253 U.S. 170 (1920) (attorneys' fees contracts for Civil War claims); and *Louisville & Nashville Railroad* v. *Mottley*, 219 U.S. 467, 482-86 (1911) (passenger's contract with railroad).[22] And courts of appeals have done the same. For example, the Fourth Circuit explicitly rejected a challenge based on the Contract Clause, "notwithstanding the employer and the insurer may have believed they had contractual rights in the limitation of benefits . . . when . . . they assumed these obligations. . . . *for the constitutional bar to such impairment is directed only to the States.*" *Norfolk, Baltimore and Carolina Lines, Inc.* v. *Director, Office of Workers' Compensation Programs*, 539 F.2d 378, 381 (4th Cir.

[21] The Court went on to explain its reasoning (224 U.S. at 614-15):

> To subordinate the exercise of the Federal authority to the continuing operation of previous contracts would be to place, to this extent, the regulation of interstate commerce in the hands of private individuals, and to withdraw from the control of Congress so much of the field as they might choose, by prophetic discernment, to bring within the range of their agreements.

[22] Moreover, in applying the Contract Clause, this Court has implied that the Contract Clause standard is different from the due process rationality test. *See United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 17 n.13 (1977); *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. at 241 & n.12.

1976) (emphasis added). In *S & M Paving, Inc.* v. *Construction Laborers Pension Trust of Southern California*, 539 F. Supp. 867, 868-71 (C.D. Cal. 1982), the court carefully considered and rejected the argument that a Contract Clause standard should be applied to the Multiemployer Act. The court said, " 'the Supreme Court has never held the Contracts Clause applicable to federal as opposed to state action.' " *Id.* at 869 (quoting *Todd Shipyards Corp.* v. *Witthuhn*, 596 F.2d 899, 903 (9th Cir. 1979)).

C. The Decisions Of This Court Relied Upon By The Court Below Are Inapposite

The court of appeals relied heavily on *Allied* to justify its decision that the Multiemployer Act's retroactivity provision is unconstitutional (J.S. 23a-26a). But *Allied* involved a Contract Clause challenge to a state law which (1) was a new attempt at regulation, (2) was apparently directed at only one employer,[23] (3) affected rights that had not vested, and (4) contained no provisions moderating the law's harsh implementation. The Multiemployer Act, on the other hand, presents no Contract Clause issues, deals with a benefit guarantee program that had been in effect for six years, protects only vested rights, and includes provisions designed to moderate its retroactive impact. *See infra* note 37.

The court below also erred when it relied on this Court's ruling in *Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U.S. 330 (1935). In its 1976 decision in *Turner Elkhorn*, this Court questioned whether *Alton* "retains vitality." 428 U.S. at 19 & n.18. The Ninth Circuit, however, concluded that this Court's decision in *Allied* revitalized *Alton*.

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[23] In *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, —— U.S. ——, 103 S. Ct. 697 (1983), this Court suggested that the statute challenged in *Allied* had been "special interest legislation" (*id.* at 708 n.25), which had been "aimed at specific employers" and "even may have been directed at one particular employer." *Id.* at 705 n.13.

Assuming that a Contract Clause ruling can revitalize a Due Process Clause decision, *Alton* is distinguishable on its facts. The law struck down there created substantive new pension rights where there had been none before. The Multiemployer Act, by contrast, merely requires a withdrawing employer to assist in the funding of pension benefits that have already vested prior to its withdrawal. In contrast to *Alton*, it cannot be said here that the ultimate payment of promised pensions effects additional payment to Plan participants for services already "fully compensated." 295 U.S. at 349. In sum, the Ninth Circuit's reliance on these cases was misplaced.

II. THE "RETROSPECTIVE ASPECTS" OF THE MULTIEMPLOYER ACT SATISFY EVEN MORE STRINGENT CONSTITUTIONAL TESTS

Although it is sufficient, for constitutional purposes, to demonstrate that the selection of April 29, 1980 as the effective date for withdrawal liability was not irrational, we do not rest our argument exclusively on this negative proposition. Rather, we now show that the retroactive aspect of the Multiemployer Act is sustainable even under standards that are more stringent than the due process rationality test. The legislative history and a sound understanding of the statutory mechanism provide substantial affirmative reasons for Congress' decision to make withdrawal liability retroactive. Hence, even if stricter criteria were to be applied, the effective date of the withdrawal liability provisions could constitutionally be fixed at a time several months before the Presidential signing of the Multiemployer Act.

A. A Brief Retroactive Period Was Essential To Discourage Last-Minute Employer Efforts To "Escape" The Effects Of The New Law

It is eminently clear from the Multiemployer Act's legislative history that Congress was motivated by sound and permissible legislative policies when it established

the effective date for employer withdrawal liability. The reasons for fixing a date prior to the final enactment of the law and its approval by the President were succinctly stated by District Judge Getzendanner in *Peick* v. *PBGC*, 539 F. Supp. 1025, 1055 (N.D. Ill. 1982), *argued*, No. 82-2081 (7th Cir., Apr. 13, 1983), a decision that rejected the constitutional challenge to retroactivity:

> Congress was concerned that if the statute became effective only upon enactment, "opportunistic" employers would be encouraged to withdraw while Congress was still debating. *See* 126 Cong. Rec. S10156 (daily ed. July 29, 1980) (remarks of Sen. Matsunaga); *id.* at S10101 (remarks of Sen. Javits). One of the very flaws Congress perceived in ERISA —its encouragement of early withdrawals—would thus have been perpetuated had [the Multiemployer Act] not included a retrospective date of effectiveness. Congress further realized that pre-enactment withdrawals affect equity and plan stability to the same extent as withdrawals occurring after enactment. Congress was particularly concerned with the relative equities between withdrawing and remaining employers: If pre-enactment withdrawals were excused, the firms still contributing on the date of enactment would face greater potential liabilities. See *id.* at S10101; *id.* at S10158 (remarks of Sen. Matsunaga). (Footnote omitted.)

Other courts, including the district court in this case, have cited the same reasons as ample justification for upholding this retroactive aspect of the Multiemployer Act.[24]

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[24] *See Republic Industries, Inc.* v. *Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d at 639; *R.A. Gray & Co.* v. *Oregon-Washington Carpenters-Employers Pension Trust Fund*, 549 F. Supp. at 537 (J.S. 41a); *Textile Workers Pension Fund* v. *Standard Dye & Finishing Co.*, 549 F. Supp. at 409; *Coronet Dodge, Inc.* v. *Speckmann*, 553 F. Supp. at 521; *Pacific Iron & Metal Co.* v. *Western Conference of Teamsters Pension Trust Fund*, 553 F. Supp. at 527-28; *Board of Trustees of the Western Conference of Teamsters Pension Trust Fund* v. *J.N. Ceazan*, 559 F. Supp. at 1214.

Congress was concerned that employers would be encouraged by the imminent prospect of the Multiemployer Act's passage to withdraw quickly from multiemployer plans. Plans already in acute financial difficulty—such as those in declining industries—were of particular concern. Congress was, for example, well aware that changes in consumer preferences, technological advances, and foreign competition resulted in declines in the number of contributing employers.[25] But declining industries were not the only source of potential heavy losses for the guarantee program. A process of decline might occur in other industries as the rhythms of economic change worked their inevitable effects.[26] Nor were the lessons of troubled plans likely to be lost on employers contributing to currently healthy plans. *See* 29 U.S.C. § 1001a(a)(4)(B) (Supp. V 1981). The first sign that a plan's contribution base was starting to erode as a result of employer withdrawals could create a "rush for the door," as other contributors began to withdraw in order to avoid higher funding costs and eventual liability upon plan termination. The employers who remained would then be responsible for funding the benefits earned by the employees of the withdrawn employers. *See supra* pp. 8-10 & note 10.

It was essential, therefore, to the realization of Congress' objective to deter "hasty" withdrawals that might be prompted by anticipation of the new law. 126 Cong.

[25] The difficulties caused by withdrawals from multiemployer plans in declining industries were discussed at length in the congressional reports and debates. *See supra* pp. 8-10 & note 10.

[26] *See* 126 Cong. Rec. E4153 (daily ed. Aug. 28, 1980, printed Sept. 3, 1980) (Rep. William Ford):

> I have followed with concern the problems of a multiemployer plan in my own district that has suffered because of the decline of the American auto industry and the migration of businesses to the Sun Belt. While this plan is well run and has no unfunded liabilities, its future has been jeopardized by the threat of employer withdrawals.

Rec. S10156 (daily ed. July 29, 1980) (Sen. Matsunaga). This was achieved initially by maintaining the date of submission of the PBGC's proposal to Congress as the effective date for withdrawal liability. That date was subsequently advanced by 14 months when, in Congress' view, the later initiation of the legislative remedy sufficed to deter premature withdrawals.

Congress' effort to deter "opportunistic" conduct during the legislative process was not unique. A strikingly similar problem confronted Congress in 1963 and 1964, when the Executive Branch, in order to limit the flow of capital from the United States, sought to impose an excise tax on foreign-issue stock purchased by American citizens. On July 18, 1963, President Kennedy sent a message to Congress accompanied by proposed legislation which became the Interest Equalization Tax Act of 1964, Pub. L. No. 88-563, 78 Stat. 809 (Sept. 2, 1964), *reprinted in* 1964 U.S. Code Cong. & Ad. News 922-968, *repealed*, Pub. L. No. 94-455, 90 Stat. 1814 (Oct. 4, 1976). The bill, which was not finally enacted until September 2, 1964, applied to all transactions occurring after the date of President Kennedy's message, making the statute effectively retroactive by almost 14 months. Pub. L. No. 88-563, § 2(c); S. Rep. No. 1267, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. Code Cong. & Ad. News 3478, 3486, 3500.

In *United States* v. *Binder*, 453 F.2d 805 (2d Cir. 1971), *cert. denied*, 407 U.S. 920 (1972), individuals who had been convicted for evading the Interest Equalization Tax challenged its retroactivity. The Second Circuit upheld the statute's constitutionality, deferring to Congress' justification for the law's retroactivity: "[t]o curb the capital flow while Congress was considering the legislation and to avoid arbitrage speculation." 453 F.2d at 806. And the Court of Appeals for the Ninth Circuit found, as to the Interest Equalization Tax, that retroactivity was not only desirable, but essential, to implement the law's purposes:

> The President in his message [proposing the tax] made it clear that if the tax was to achieve its purpose, it was essential that legislation creating the tax be made effective as of the date of the presidential message . . . otherwise a rush by investors to beat the deadline would serve to aggravate the problem and render the proposal self-defeating.

Purvis v. *United States,* 501 F.2d 311, 312 (9th Cir. 1974), *cert. denied,* 420 U.S. 947 (1975) (footnote omitted).

On a number of other occasions, this Court and other courts have approved laws with retroactive effective dates,[27] as well as laws retroactive not in form but in their effect on closed transactions.[28] The legislative dis-

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[27] *See, e.g., United States* v. *Darusmont,* 449 U.S. 292 (1981) (per curiam) (retroactive application of minimum tax provisions of Internal Revenue Code amendments); *Lichter* v. *United States,* 334 U.S. 742, 777, 789 (1948) (October 1942 amendments to Renegotiation Act made retroactive to date of original act in April 1942); *Fleming* v. *Rhodes,* 331 U.S. 100 (1947) (Price Control Extension Act backdated to cover time when original Emergency Price Control Act had expired); *United States* v. *Hudson,* 299 U.S. 498 (1937) (retroactive application of federal tax on silver trading); *Newport News Shipbuilding & Dry Dock Co.* v. *United States,* 374 F.2d 516, 525, & n.10 (Ct. Cl. 1967) (Renegotiation Act passed in September 1954 backdated to first of year); *Eastern Machinery Co.* v. *Under Secretary of War,* 182 F.2d 99, 100 (D.C. Cir. 1950) (July 1943 amendment to Renegotiation Act made retroactive to April 1942).

[28] *See, e.g., Usery* v. *Turner Elkhorn Mining Co.,* 428 U.S. 1 (1976) (black lung benefits extended to coal miners who had quit jobs before legislation enacted); *International Union of Electrical, Radio & Machine Workers* v. *Robbins & Myers, Inc.,* 429 U.S. 229 (1976) (congressional modification of a statute of limitations could apply retroactively to revive barred action); *Home Bldg. & Loan Ass'n* v. *Blaisdell,* 290 U.S. 398 (1934) (state depression statute to protect homeowners from foreclosure held not to violate due process even though it affected already existing mortgages); *Travelers Insurance Co.* v. *Marshall,* 634 F.2d 843 (5th Cir. 1981) (expansion of death benefits for longshoremen held constitutionally applicable to those injured before amendment expanding benefit was

ruption of an employer's expectations which are settled by a closed transaction is not constitutionally different when caused by a retroactive effective date.[29] In *Turner Elkhorn*, for example, the employer could no more undo the earlier decisions that later subjected it to unanticipated black lung liability than could Gray reverse its decision to withdraw from the Plan, which subjected it to withdrawal liability.[30] Just as this Court sustained *Turner Elkhorn*'s retroactive liability in the context of a statute "adjusting the burdens and benefits of economic life," 428 U.S. at 15, so should it uphold Congress' decision to impose retroactive withdrawal liability.

Retroactive application was in fact necessary in the Multiemployer Act "to prevent employers from withdrawing in droves from multiemployer plans once they antici-

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enacted); *United States* v. *Perry*, 431 F.2d 1020 (9th Cir. 1970) (1960 amendment to Anti-Kickback Act held applicable to kickback made ten years earlier).

[29] Contrary to the implication in Gray's Motion to Affirm (pp. 6-7), the constitutionality of this kind of retroactivity is not limited to statutes that may be characterized as "tax laws." The same reasoning as governs "tax laws" is applicable, as well, to any form of economic regulation, particularly one in which liability is imposed to insure that the reasonable contractual expectations of a large segment of society—such as the employers that continue to contribute to multiemployer plans and the participants in those plans—are realized. Indeed, the Court of Claims in *First National Bank in Dallas* v. *United States*, 420 F.2d 725 (Ct. Cl.), *cert. denied*, 398 U.S. 950 (1970), emphasized that the Interest Equalization Tax Act was principally a *regulatory* enactment rather than a revenue-producing law, and concluded that the Act's regulatory purpose strengthened the case for its retroactive application. *Id.* at 729-30.

[30] Indeed, the expectations of Turner Elkhorn Mining Co. were even more "settled" than were the expectations of Gray. *See supra* pp. 3-13; *infra* pp. 35-40. Moreover, Congress was sensitive to the settled expectations of employers who, unlike Gray, had committed themselves to withdrawal before the *introduction* of the Multiemployer Act. *See supra* p. 12. Congress also provided a means for reducing or eliminating the retroactive impact of withdrawal liability. *See* 29 U.S.C. § 1387 (Supp. V 1981).

pated passage of [the Multiemployer Act]." *Coronet Dodge, Inc.* v. *Speckmann*, 553 F. Supp. at 521. Indeed, the court of appeals did not disagree with the need to deter employer withdrawals. It chose, however, to override Congress' determination as to how to achieve such deterrence and relied, instead, on its own appraisal of "[o]ther legislative programs" (J.S. 25a). Those other programs, however, would have been inadequate. The existence of contingent liability, as provided in ERISA, was not an effective deterrent.[31] Nor, apparently, was the court below aware that plans which do not terminate can still be harmed by employer withdrawals. *See* 29 U.S.C. § 1001a(a)(4)(A) (Supp. V 1981). Congress also specifically found that employer withdrawals not only affect participants and employers who continue to contribute, but also labor-management relations. *Id.*[32] The Ninth's Circuit determination to consider legislative alternatives led it to uninformed judgments on the effect of legislation that Congress had carefully studied and exhaustively reviewed. *See also supra* note 19.

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[31] Collective bargaining, specifically in the construction industry right now, is in chaos because of that 30-percent contingent liability aspect. We have employers who are saying to themselves and their colleagues, let us get . . . out from under these collective bargaining agreements now. We will take *a calculated risk, they will not fold in 5 years and we will be home free.*

House Labor Hearings, supra note 4, at 380 (Robert A. Georgine, Chairman, National Coordinating Committee for Multiemployer Plans, and President, Building Trades Department of the AFL-CIO) (emphasis added).

[32] For instance, conflict between withdrawing and remaining employers and the uncertainty over the impact of withdrawals on pension expectations contributed to the lengthy coal miners' strike in 1978. 126 Cong. Rec. H3952 (daily ed. May 21, 1980) (Rep. Perkins); *id.* at S10105 (daily ed. July 29, 1980) (Sen. Randolph).

B. Congress Properly Held Employers Responsible For Knowledge That The Multiemployer Act Would Be Approved

The central issue in this case is whether Congress may rationally act to discourage last-minute efforts to nullify the economic impact of legislation that is on the verge of enactment by announcing that a pending bill, if enacted into law, will take effect as of a date during the final stages of Congress' deliberation, and then incorporating that date into law. The issue is further narrowed by two special circumstances surrounding the imposition of a retroactive effective date: (1) such a provision had been a consistent feature of this legislation during the two years of its consideration, and (2) the date finally enacted into law was advanced by some 14 months, thereby coinciding with major congressional committee action. On these facts, it is plainly unsound to say, as the court below did, that for constitutional purposes, employers "relied reasonably upon their collective bargaining agreements with the Unions and the contingent withdrawal liability provisions of ERISA" (J.S. 19a).

Other courts have strongly disagreed with the conclusion of the court below. One federal judge has said that during the five-month period between April 29, 1980, and the date on which the Multiemployer Act became law "there was strong evidence to suggest that [the Multiemployer Act] was likely to pass and that it would be retrospective when it did." *Peick* v. *PBGC*, 539 F. Supp. at 1053. Noting that it was "hardly credible" that an employer had no actual notice of such retroactivity, another court said that "[an employer's] ignorance must have resulted from a culpable failure to acquaint itself with information publicly available." *Textile Workers Pension Fund* v. *Standard Dye & Finishing Co.*, 549 F. Supp. at 409 n.8.[33]

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[33] The general news media, for instance, not only followed the legislative progress of the Multiemployer Act, *see, e.g.*, The New

When a new provision of law is so substantially anticipated on the public record, the law may constitutionally have a retroactive application to the period when it is under legislative consideration. This Court so held in *Darusmont*, which concerned a completed financial transaction whose tax consequences were altered by subsequent legislation. In rejecting the taxpayer's assertion of reliance on prior law, this Court said that the taxpayer was

> hardly in a position to claim surprise at the 1976 amendments to the minimum tax. The proposed increase in rate had been under public discussion for almost a year before its enactment. The Tax Reform Act of 1976 reflected a compromise between the House and Senate proposals. Both bills, however, provided that the changes in the minimum tax were to be effective for taxable years beginning after 1975. Appellee, therefore, had ample advance notice of the increase in the effective minimum rate.

449 U.S. at 299 (citations omitted).[34]

This Court's ruling in *Darusmont* surely applies to Gray, which received repeated statutory warnings that it might not escape responsibility for financing the Pension Plan's benefit promises. Since September 2, 1974, when

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York Times, Mar. 26, 1980, at 18 (App. 3a-5a), but also reported that it would operate retroactively, *see, e.g.*, The Wall Street Journal, Mar. 28, 1980, at 7 (App. 6a); Associated Press, Washington Briefs, Apr. 29, 1980 (App. 7a).

[34] By the same rationale, the Court of Claims upheld the retroactivity of the 1964 Interest Equalization Tax Act in *First National Bank in Dallas* v. *United States*, 420 F.2d at 730 (footnote omitted). The court said:

> [I]t is our view that where there is reasonable cause to believe or expect that a tax will be imposed upon a presently nontaxable transaction, the retrospective application of such tax does not constitute a denial of due process.

ERISA created contingent termination liability, Gray was on notice that its contractual disclaimers of liability for Plan *benefits* had been statutorily displaced, and that in the event of the Plan's termination it could be held responsible for additional financing of the Plan's obligations. From the date of ERISA's passage, employers like Gray should have anticipated that they could not withdraw scot-free from multiemployer plans, leaving the funding of their share of vested benefits to other employers. Even the congressional opponents of withdrawal liability conceded that ERISA had fundamentally altered employers' obligations to multiemployer plans by "making employers liable for plan benefits rather than just their negotiated contributions." H.R. Rep. No. 869, Part I, 96th Cong., 2d Sess. 222, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2988 (separate views).

Indeed, the very Trust Agreement to which Gray was a party appeared to recognize that changes in the law would alter its financial obligations. Article II, Section 6 provides:

> The liability of any Individual Employer to the Fund, or with respect to the Plan, shall be limited to the contributions required by the Collective Bargaining Agreement or Trust Agreement . . . . The Individual Employers shall not be required to make any further contributions to the cost of operation of the Fund or of the Plan, except as herein elsewhere provided. *This section shall only apply to the extent permitted by law.*

(J.A. 117-18; emphasis added). Article II, Section 7 of the Trust Agreement contains a similar clause: "*To the extent permitted by law,*" no employer or signatory association "shall be liable or responsible for any debts, liabilities or obligations of the Fund or of the Trustees" (J.A. 118; emphasis added). And Section 10.03 of the Plan provides, in pertinent part, as follows (J.A. 97; emphasis added):

> This pension plan has been established on the basis of an actuarial calculation which has established, to the extent possible, that the contributions will, if continued, be sufficient to maintain the plan on a permanent basis, fulfilling the funding requirements of ERISA. *Except for liabilities which result from provisions of ERISA*, nothing contained in this plan shall be construed to impose any obligation to contribute beyond the obligation of the Employer to make contributions as stipulated in its collective bargaining agreement with the Union. . . .

The enactment of ERISA was only the first of several legislative events that warned Gray that it might be subject to obligations to the Plan beyond its bargained contributions. Since December 19, 1977, when Congress extended the mandatory coverage deadline and instructed the PBGC to propose alternatives to the existing program, Gray had notice that Congress was dissatisfied with the multiemployer plan termination insurance program and that the PBGC had been made responsible for proposing alternative approaches to the original statutory framework. 91 Stat. 1501 (1977). After July 1, 1979, when Congress again extended the mandatory coverage deadline (93 Stat. 70), Gray had notice that the PBGC's proposals were being given serious scrutiny by Congress.[35] And, after May 1, 1980, when Congress extended the deadline for only two months (94 Stat. 341), Gray had

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[35] *See* 125 Cong. Rec. H4004-05 (daily ed. June 4, 1979) (Rep. Erlenborn); *id.* at S7014 (daily ed. June 6, 1979) (Sen. Javits). The PBGC guide to its recommendations to Congress, H.R. Rep. No. 215, 96th Cong., 1st Sess. 8-9, *reprinted in* 1979 U.S. Code Cong. & Ad. News 297, states:

> Problem 6: The current rules governing an employer's withdrawal from a plan fail to protect participants, remaining employers and the PBGC from the costs of voluntary employer withdrawals. . . .
>
> The remedy: Require employers who leave a plan to continue to make periodic payments to fund their liabilities.

notice that Congress was on the verge of enacting a bill. By that date two committees in the House of Representatives and one in the Senate had approved bills providing for withdrawal liability retroactive to February 27, 1979. In connection with the two-month extension of the mandatory coverage deadline, a member of a fourth committee had announced that the bill reported by it would also provide for retroactive withdrawal liability. Under these circumstances, Gray's directors, "as prudent businessmen, surely could be expected to know, and can properly be charged with knowing, that ERISA was likely to be amended and that withdrawal liability under the [Multiemployer Act] would probably be imposed retroactively." *Textile Workers Pension Fund* v. *Standard Dye & Finishing Co.*, 549 F. Supp. at 409.[36]

Finally, Congress advanced the effective date by 14 months to ensure fairness.[37] Having been on notice of the

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[36] The Associated General Contractors of America, the employer association that negotiated the Carpenters Master Labor Agreement adopted by Gray, *see supra* p. 14, participated extensively in the legislative process that produced the Multiemployer Act. The AGC's statements before the Congress are found at *House Labor Hearings, supra* note 4, at 449, 941 (June 7, 1979); *Senate Labor Hearings, supra* note 10, at 639, 643 (June 27, 1979); *1979 House Ways and Means Hearing, supra* note 12, at 124 (July 25, 1979); *1980 House Ways and Means Hearing, supra* note 12, at 122 (Feb. 19, 1980); and *Senate Finance Hearing, supra* note 10, at 206, 208 (Mar. 18, 1980). Congress heeded construction employers' admonitions that their industry required special treatment by the Multiemployer Act, and the Act "recognizes and makes provision for the unique characteristics and requirements of the construction industry represented by the NCEC." *Id.* at 165 (Mar. 18, 1980) (supplement to the testimony of the National Construction Employers Council). Withdrawal liability is assessed only against a construction employer that, as Gray has done, ceases contributing to a plan and continues construction work in competition with remaining employers. *See* 29 U.S.C. § 1383(b)(2)(B) (Supp. V 1981).

[37] In addition to shortening the retroactivity period, Congress took other action to reduce the effect of the statute's retroactive

earlier date, Gray—which withdrew from its plan after the Multiemployer Act had been approved by the full House of Representatives and by the Senate Committee on Education and Labor—could hardly complain of the April 29, 1980 date.

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application. Section 4217 of ERISA, 29 U.S.C. § 1397 (Supp. V 1981), provides that where, prior to the statute's effective date, an employer closed one or more facilities or terminated one or more collective bargaining agreements with respect to which it was making contributions to a plan, contributions and contribution base units relating to such facilities or agreements will not be taken into account in computing an employer's withdrawal liability or in determining whether a partial withdrawal has occurred. One effect of Section 4217 is to reduce an employer's liability in the event of a withdrawal by approximately the percentage of its contributions that ceased prior to the effective date. In addition, the statute's general moderating provisions may also mitigate liability for preenactment withdrawals. 29 U.S.C. §§ 1383(b), (c), (d), (f), 1384, 1387, 1388, 1389, 1398, 1399(c)(1), 1404, and 1405 (Supp. V 1981). *See also Peick* v. *PBGC*, 539 F. Supp. at 1050-51.

CONCLUSION

Congress has determined that disappointment of participant expectations in the area of pension benefits is a national problem. The Multiemployer Act's insolvency insurance program for multiemployer plans is a crucial aspect of the legislative response to this problem. The brief period of retroactive withdrawal liability, which was essential to the fulfillment of the Multiemployer Act's purposes, meets all constitutional tests. The judgment of the court of appeals declaring the Multiemployer Act unconstitutional should be reversed.

Respectfully submitted,

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December 12, 1983

APPENDIX

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*** The statutory provisions reproduced herein are derived from ERISA as originally enacted and codified at title 29 United States Code (1976) and from ERISA as amended by the Multiemployer Act and codified at title 29 United States Code (Supp. V 1981). Thus an amended provision appearing in Part H will, where relevant to the brief, appear in Part G in its unamended form. Only those provisions cited in the PBGC brief and certain related provisions are reproduced.**

APPENDIX

5 ELLIOT'S DEBATES 546 (2d ed. 1845)

* * * *

Mr. SHERMAN thought "from time to time," the best rule to be given. "Annually" was struck out, and those words inserted, *nem. con.*

The motion of Col. Mason, so amended, was then agreed to, *nem. con.*, and added after "appropriations by law," as follows:—

> "and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time."

The first clause of article 1, sect. 10, was altered so as to read,—

> "No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility."

Mr. GERRY entered into observations inculcating the importance of public faith, and the propriety of the restraint put on the states from impairing the obligation of contracts; alleging that Congress ought to be laid under the like prohibitions. He made a motion to that effect. He was not seconded.

Adjourned.

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PENSION BENEFIT GUARANTY CORPORATION ANNUAL REPORT TO THE CONGRESS FY 82 PAGES 6-7

* * * *

Trusteed Single-Employer Plans

PBGC must become the trustee of terminated single-employer plans that do not have sufficient assets to pay guaranteed benefits. Under the Multiemployer Act, PBGC becomes trustee of multiemployer plans only in unusual circumstances. During FY 82, PBGC became trustee for 120 terminated single-employer pension plans having 34,000 participants. At fiscal year end, another 134 pension plans were being processed by PBGC in anticipation of its becoming trustee (See Table II). In the latter cases, PBGC assures that participants continue to receive their guaranteed benefits while the necessary arrangements are made to take over their plans.

After eight years of operation, PBGC is trustee for 780 pension plans and directly responsible for paying PBGC guaranteed pensions to about 106,000 people entitled to immediate or deferred benefits under terminated plans.

* * * *

THE NEW YORK TIMES, WEDNESDAY, MARCH 26, 1980, PAGE A18

Congress Speeds Bill to Strengthen Multi-Employer Pension Programs

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Business and Labor Join in a Move to Shore Up Plans That Guarantee Funds for Many Retired Workers

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By PHILIP SHABECOFF
Special to the New York Times

WASHINGTON, March 25—Backed by an unusual alliance of business and labor, legislation to shore up financially troubled multi-employer pension plans is now speeding through the legislative process on Capitol Hill.

Critics of the legislation say it could result in sharply reduced retirement benefits for many of the workers covered by the affected pension plans.

But supporters say that without the provisions of the proposed bill, many of these pension plans would collapse or otherwise be terminated by employers who would not or could not assume the financial liability of guaranteeing the full pensions.

The bill, which was being drafted by the House Ways and Means Committee today after having been approved earlier by the Senate Labor Committee and the House Labor Committee, affects pension plans sponsored by more than one employer and covering more than one group of workers. The plans cover about 8 million workers in such industries as construction, textiles, mining and trucking. Typically, unions as well as employers are trustees of the plans.

* * * *

The Employee Retirement Income Security Act of 1974 required pension plans to insure themselves through a

new Government agency called the Pension Benefit Guaranty Corporation. The law required that 100 percent of all benefits payable to retired persons be guaranteed up to a total of $1,159.09 a month, a ceiling high enough to cover most pensions.

But the rule applied only to single-employer pension plans. Multi-employer plans, which were considered at the time to be less risk-prone because of their makeup, were given different treatment. Participation in the Pension Benefit Guaranty Corporation was not mandatory at first, and premiums required were considerably lower than those for single-employer plans.

Since 1974, multi-employer plans for millinery and milk delivery workers collapsed, and serious problems developed in others. Business and labor representatives and members of Congress acknowledged that guarantees were needed for these plans, too. Accordingly, as of May 1, multi-employer plans are scheduled to be covered by the Pension Benefit Guaranty Corporation.

Many employers participating in the plans indicated, however, that the insurance premiums involved in guaranteeing the pensions would be high enough to make it preferable to end their participation. The trustees of sound plans said they should not have to pay for the insurance of plans that were in trouble. Others were worried that they would be left bearing the burden of liability of their plan as other employers dropped out.

Turning to Nonunion Labor

Unions, in addition to wanting a guarantee of pensions for their members, found that some employers were ending their collective bargaining agreements and turning to nonunion labor rather than staying in the expensive program.

To keep employers and unions in the pension plans, the pending legislation would do these things:

¶ Pension plans in trouble would be required to cut benefits to reduce potential liability. Benefits could be cut at first to the levels in effect five years earlier; if employer contributions are still not sufficient, the benefits could be cut back still further.

¶ Employers who do withdraw from a multi-employer plan generally must continue to contribute their share until they have paid off the pensions promised in the plan.

The insurance premiums for the plans would be raised from an originally contemplated 50 cents a year for each worker or retired worker to $2.60 a year for nine years under the House version of the bill, and a scale rising to $3.40 a worker in the Senate version.

'Delicate Balance' vs. 'Giveaway'

Supporters of the bill describe it as a "delicate balance" among competing interests that creates incentives for both employers and unions to continue to participate in the pension plans, and disincentives for terminating plans.

But Karen W. Ferguson, director of the Pension Rights Center, calls the bill "a great Government giveaway" because it could substantially reduce pension benefits expected by retired persons without their having any say in the matter.

Senator Jacob K. Javits, Republican of New York, argued that while it may be necessary to cut guarantees of benefits somewhat to insure the viability of the plans, it would be better to cut them less and raise employers' premiums more.

Several unions, including the United Steel Workers and the United Automobile Workers, are staying neutral on the pending pension legislation. A steelworker official expressed concern that a law reducing benefit guarantees for multi-employer pension plans would be seized upon by single-employer plans as a precedent. Steelworkers are generally covered by single-employer plans.

THE WALL STREET JOURNAL, FRIDAY, MARCH 28, 1980, PAGE 7

Ways-Means Panel Votes Its Version Of Pension Plan Bill

By a WALL STREET JOURNAL *Staff Reporter*

WASHINGTON—The House Ways and Means Committee approved a bill aimed at strengthening multiemployer pension plans.

As passed by the Ways and Means panel, the bill contains few important changes from the version approved earlier this year by the House Committee on Education and Labor. But the Ways and Means Committee agreed to an easier rule for determining the liability of employers who withdraw from multiemployer plans.

Under the Education and Labor panel's bill, an employer would be liable for part of the plan's unfunded benefit obligations if he withdrew from the plan after Feb. 27, 1979. Under the Ways and Means Committee's bill, he wouldn't be liable if he announced his withdrawal before May 3, 1979, withdrew within 90 days of the announcement and can show that his previous contributions are enough to cover vested benefits.

The full House will have to choose between the bills. A similar measure is working its way through the Senate.

Multiemployer plans usually involve a number of companies that bargain with a single union. Single-employer plans cover only one company.

AP WIRE, APRIL 29, 1980 (REPRODUCED FROM LEXIS)

The Associated Press

April 29, 1980, Tuesday, AM cycle

SECTION: Washington Dateline

LENGTH: 150 words

DATELINE: WASHINGTON

KEYWORD: Washington Briefs

BODY:

The Senate Finance Committee voted Tuesday to delay until July 1 the start of mandatory insurance of pension plans covering employees of more than one company.

The Associated Press, April 29, 1980

Under a 1974 law, the federal Pension Benefit Guarantee Corp. is required to insure multi-employer plans starting on May 1. The Finance Committee wants the delay so Congress can complete action on bills that would change the guarantee program.

The House already has voted to delay mandatory coverage of multi-employer plans until June 1.

The Finance Committee agreed that any changes in the guarantee provisions would be made retroactive to Tuesday.

The guarantee program was created in an effort to protect the retirement pensions of workers who move from one company to another and those whose employers go out of business. The mandatory insurance provisions already apply to single-employer plans.

BY THE COMPTROLLER GENERAL REPORT TO THE CONGRESS OF THE UNITED STATES

Legislative Changes Needed To Financially Strengthen Single Employer Pension Plan Insurance Program

The federal insurance program for single employer (sponsor) pension plans administered by the Pension Benefit Guaranty Corporation was created by the Employee Retirement Income Security Act of 1974. At the end of fiscal year 1982, the program reported a $333 million deficit because claims from terminating plans accumulated faster than they could be financed from premiums. The Corporation estimates that unless premiums are increased this deficit could increase to an estimated $938 million by fiscal year 1987.

Claims result primarily from bankrupt sponsors who are unable to continue funding pension plans. However, other circumstances also contribute to the increasing deficit: (1) full insurance coverage is generally provided for benefits granted retroactively for past service that have received limited sponsor funding; (2) minimum plan contributions by sponsors are deferred with Internal Revenue Service approval and remain unpaid upon plan termination; and (3) authority to recover unfunded pension liability for plans from sponsors is limited.

This report contains recommendations to the Congress to financially strengthen the program.

GAO/HRD-84-5
NOVEMBER 14, 1983

* * * *

[42] CHAPTER 5

PBGC AUTHORITY LIMITED IN RECOVERING UNFUNDED LIABILITY FROM TERMINATING PLAN SPONSORS

ERISA employer liability provisions limit PBGC recovery of unfunded pension obligations from sponsors terminating pension plans. During the first 7 years of operation, the insurance program incurred $397 million in claims for underfunded plans, of which it expected to recover an estimated $60 million of employer liability. Pension obligations not recovered from sponsors of terminating plans are funded from premiums paid to the program by ongoing plans.

When a plan terminates, the plan's sponsor is obligated by ERISA to finance any deficiency in plan assets needed to meet the insurance program's guarantee levels up to a limit equal to 30 percent of the sponsor's net worth—the difference between the value of business assets and liabilities accumulated at a point in time. Such liability provisions were expected to deter solvent sponsors from terminating underfunded plans and produce a reasonable, although limited, recovery of liability from insolvent sponsors. These objectives are not being met because most sponsors do not have a positive net worth or their net worth is low in relation to the level of unfunded guaranteed benefits in terminated plans.

Our review of 38 pension plan terminations by 25 sponsors (which included 8 ongoing and 17 in bankruptcy or business liquidation) showed that PBGC's recovery from the terminating plans' sponsors was limited because:

—Thirty percent of their net worth was not sufficient to pay the unfunded pension plan liability for seven sponsors that continued in business after terminating plans.

—Contingent liabilities were not established against six companies that divested portions of their businesses, including underfunded pension plans terminated later by insolvent sponsors.

—Six insolvent sponsor's assets were distributed to unsecured creditors, but PBGC recovered little or none of its claim, which was limited by the sponsor's net worth.

[43] LIMITATIONS ON RECOVERY OF EMPLOYER LIABILITY FROM ONGOING SPONSORS

The insurance program is absorbing large plan insufficiencies when ongoing plan sponsors voluntarily terminate insufficient plans. PBGC absorbs the pension liabilities of these plans without significant recovery of employer liability when the sponsor terminates a deficient plan at a time when business net worth is low and PBGC has little or no financial basis under ERISA to recover employer liability.

Almost one-third of terminated pension plans trusteed or expected to be trusteed by the insurance program as of September 30, 1981, were sponsored by employers who continued in business while avoiding about $17 million in liabilities for plan asset insufficiencies (see table 3, p. 11). While this sponsor group has the highest employer liability collection rate, it is questionable whether the program should act as a financial relief mechanism for solvent sponsors to avoid the consequence of pension plan underfunding.

The Congress and authorities in the pension community have raised concerns that other ongoing businesses in financial distress seeking relief from pension liabilities they have created could take advantage of ERISA provisions and terminate pension plans when company net worth is low. PBGC has identified 34 major firms with large unfunded pension liabilities that are under financial

pressure. Should these companies terminate their plans, PBGC estimates they could generate claims of about $4.4 billion against the insurance program.

Eight of the sponsors in our review terminated pension plans and were still in business in 1982. About $12.8 million of plan asset insufficiencies totaling $26.3 million was expected to be collected from seven sponsors (PBGC's evaluation of one sponsor's net worth was not completed at the time of our review). The following examples illustrate ways in which ERISA's 30-percent net worth limitation prevented PBGC from recovering additional unfunded liabilities.

—A sporting goods manufacturer experienced net losses of $2.8 million and $4 million in 1976 and 1977, respectively. Citing adverse financial conditions, the company terminated two pension plans in December 1977. The plans were insufficient by about $1.8 million. Because the company's net worth was $200,000 at the time it terminated the plans, PBGC expected to collect only $60,000 in employer liability. An August 1982 Dun & Bradstreet, Inc., report showed that, despite the depressed economy, the company's sales increased and an operating profit of [44] $145,000 after taxes was realized in 1980. Hence, this employer's net worth did not prove to be an adequate gauge of its ability to meet pension obligations.

—A mattress manufacturer adopted a pension plan for its hourly employees in 1950 and one for its salaried employees in 1960. The company, after suffering losses of about $3.9 million during fiscal years 1973-76 and reporting a net worth of $50,000 as of March 1976, terminated its salaried plan in 1976 and its hourly plan in 1978. The 1976 termination resulted in a claim of $596,941 on the insurance program and a collection of $15,000 in employer liability. The 1978 termination resulted

in a claim of $512,432, and PBGC expects that employer liability will be low. A September 1982 Dun & Bradstreet report showed the company continuing in business with estimated annual sales of about $8 million compared to about $4.4 million in 1978. Despite its financial distress, the company established a successor plan for its hourly employees which provided defined benefits covered by PBGC's insurance program, including past service benefits for the same employees extending back to the years covered by the terminated insufficient plan.

When an ongoing sponsor terminates its plan(s), there are other negative implications for the insurance program and for plan participants. Plan participants must accept guaranteed benefit levels that are often reduced by ERISA benefit ceilings in lieu of the plan's higher benefit levels. The added requirements for benefit payment administration associated with participants in the plans that ongoing sponsors terminate increase insurance program costs paid by all plans.

* * * *

STATUTORY PROVISIONS

29 U.S.C. (1976)

§ 1001. Congressional findings and declaration of policy

(a) Benefit plans as effecting [sic] interstate commerce and the Federal taxing power

The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inade-

quacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance

It is hereby further declared to be the policy of this chapter to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

§ 1082. Minimum funding standards

Avoidance of accumulated funding deficiency

(a)(1) Every employee pension benefit plan subject to this part shall satisfy the minimum funding standard (or the alternative minimum funding standard under section 1085 of this title) for any plan year to which this part applies. A plan to which this part applies shall have satisfied the minimum funding standard for such plan for a plan year if as of the end of such plan year the plan does not have an accumulated funding deficiency.

(2) For the purposes of this part, the term "accumulated funding deficiency" means for any plan the excess of the total charges to the funding standard account for all plan years (beginning with the first plan year to which this part applies) over the total credits to such account for such years or, if less, the excess of the total charges to the alternative minimum funding standard account for such plan years over the total credits to such account for such years.

Funding standard account

(b)(1) Each plan to which this part applies shall establish and maintain a funding standard account. Such account shall be credited and charged solely as provided in this section.

(2) For a plan year, the funding standard account shall be charged with the sum of—

(A) the normal cost of the plan for the plan year,

(B) the amounts necessary to amortize in equal annual installments (until fully amortized)—

(i) in the case of a plan in existence on January 1, 1974, the unfunded past service liability

under the plan on the first day of the first plan year to which this part applies, over a period of 40 plan years,

(ii) in the case of a plan which comes into existence after January 1, 1974, the unfunded past service liability under the plan on the first day of the first plan year to which this part applies, over a period of 30 plan years (40 plan years in the case of a multiemployer plan),

(iii) separately, with respect to each plan year, the net increase (if any) in unfunded past service liability under the plan arising from plan amendments adopted in such year, over a period of 30 plan years (40 plan years in the case of a multiemployer plan),

(iv) separately, with respect to each plan year, the net experience loss (if any) under the plan, over a period of 15 plan years (20 plan years in the case of a multiemployer plan), and

(v) separately, with respect to each plan year, the net loss (if any) resulting from changes in actuarial assumptions used under the plan, over a period of 30 plan years,

* * * *

§ 1302. Pension Benefit Guaranty Corporation

(a) Establishment within Department of Labor

There is established within the Department of Labor a body corporate to be known as the Pension Benefit Guaranty Corporation. In carrying out its functions under this subchapter, the corporation shall be administered by the chairman of the board of directors in accordance with policies established by the board. The purposes of this subchapter, which are to be carried out by the corporation, are—

(1) to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants,

(2) to provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries under plans to which this subchapter applies, and

(3) to maintain premiums established by the corporation under section 1306 of this title at the lowest level consistent with carrying out its obligations under this subchapter.

§ 1322. Benefits guaranteed

(a) Nonforfeitable benefits

Subject to the limitations contained in subsection (b) of this section, the corporation shall guarantee the payment of all nonforfeitable benefits (other than benefits becoming nonforfeitable solely on account of the termination of a plan) under the terms of a plan which terminates at a time when section 1321 of this title applies to it.

(b) Exceptions

(1) Except to the extent provided in paragraph (8)—

(A) no benefits provided by a plan which has been in effect for less than 60 months at the time the plan terminates shall be guaranteed under this section, and

(B) any increase in the amount of benefits under a plan resulting from a plan amendment which was made, or became effective whichever is later, within 60 months before the date on which the plan terminates shall be disregarded.

(2) For purposes of this subsection, the time a successor plan (within the meaning of section 1321(a) of

this title) has been in effect includes the time a previously established plan (within the meaning of section 1321(a) of this title) was in effect. For purposes of determining what benefits are guaranteed under this section in the case of a plan to which section 1321 of this title does not apply on September 3, 1974, the 60 month period referred to in paragraph (1) shall be computed beginning on the first date on which such section does apply to the plan.

(3) The amount of monthly benefits described in subsection (a) of this section provided by a plan, which are guaranteed under this section with respect to a participant, shall not have an actuarial value which exceeds the actuarial value of a monthly benefit in the form of a life annuity commencing at age 65 equal to the lesser of—

(A) his average monthly gross income from his employer during the 5 consecutive calendar year period (or, if less, during the number of calendar years in such period in which he actively participates in the plan) during which his gross income from that employer was greater than during any other such period with that employer determined by dividing 1/12 of the sum of all such gross income by the number of such calendar years in which he had such gross income, or

(B) $750 multiplied by a fraction, the numerator of which is the contribution and benefit base (determined under section 430 of Title 42) in effect at the time the plan terminates and the denominator of which is such contribution and benefit base in effect in calendar year 1974.

The provisions of this paragraph do not apply to nonbasic benefits.

(4)(A) The actuarial value of a benefit, for purposes of this subsection, shall be determined in accordance with regulations prescribed by the corporation.

* * * *

(8) Benefits described in paragraph (1) are guaranteed only to the extent of the greater of—

(A) 20 percent of the amount which, but for the fact that the plan or amendment has not been in effect for 60 months or more, would be guaranteed under this section, or

(B) $20 per month,

multiplied by the number of years (but not more than 5) the plan or amendment, as the case may be, has been in effect. In determining how many years a plan or amendment has been in effect for purposes of this paragraph, the first 12 months following the date on which the plan or amendment is made or first becomes effective (whichever is later) constitutes one year, and each consecutive period of 12 months thereafter constitutes an additional year. This paragraph does not apply to benefits payable under a plan unless the corporation finds substantial evidence that the plan was terminated for a reasonable business purpose and not for the purpose of obtaining the payment of benefits by the corporation under this subchapter.

* * * *

§ 1361. Amounts payable by corporation

The corporation shall pay benefits under a plan terminated under this subchapter subject to the limitations and requirements of subtitle B of this subchapter. Amounts guaranteed by the corporation under section 1322 of this title shall be paid by the corporation out of the appropriate fund.

§ 1362. Liability of employer

(a) Employers covered

This section applies to any employer who maintained a plan (other than a multiemployer plan) at the time it was terminated, but does not apply—

(1) to an employer who maintained a plan with respect to which he paid the annual premium described in section 1306(a)(2)(B) of this title for each of the 5 plan years immediately preceding the plan year during which the plan terminated unless the conditions imposed by the corporation on the payment of coverage under section 1323 of this title do not permit such coverage to apply under the circumstances, or

(2) to the extent of any liability arising out of the insolvency of an insurance company with respect to an insurance contract.

(b) Amount of liability

Any employer to which this section applies shall be liable to the corporation, in an amount equal to the lesser of—

(1) the excess of—

(A) the current value of the plan's benefits guaranteed under this subchapter on the date of termination over

(B) the current value of the plan's assets allocable to such benefits on the date of termination, or

(2) 30 percent of the net worth of the employer determined as of a day, chosen by the corporation but not more than 120 days prior to the date of termination, computed without regard to any liability under this section.

§ 1364. Liability of employers on termination of plan maintained by more than one employer

(a) This section applies to all employers who maintain a plan under which more than one employer makes contributions at the time such plan is terminated, or who,

at any time within the 5 plan years preceding the date of termination, made contributions under the plan.

(b) The corporation shall determine the liability of each such employer in a manner consistent with section 1362 of this title except that the amount of the liability determined under section 1362(b)(1) of this title with respect to the entire plan shall be allocated to each employer by multiplying such amounts by a fraction—

(1) the numerator of which is the amount required to be contributed to the plan by each employer for the last 5 plan years ending prior to the termination, and

(2) the denominator of which is the total amount required to be contributed to the plan by all such employers for such last 5 years,

and the limitation described in section 1362(b)(2) of this title shall be applied separately to each employer. The corporation may also determine the liability of each such employer on any other equitable basis prescribed by the corporation in regulations.

§ 1381. Effective date; special rules

(a) The provisions of this subchapter take effect on September 2, 1974.

(b) Notwithstanding the provisions of subsection (a) of this section, the corporation shall pay benefits guaranteed under this subchapter with respect to any plan—

(1) which is not a multiemployer plan,

(2) which terminates after June 30, 1974, and before September 2, 1974,

(3) to which section 1321 of this title would apply if that section were effective beginning on July 1, 1974, and

(4) with respect to which a notice is filed with the Secretary of Labor and received by him not later

than 10 days after September 2, 1974, except that, for reasonable cause shown, such notice may be filed with the Secretary of Labor and received by him not later than October 31, 1974, stating that the plan is a plan described in paragraphs (1), (2), and (3).

* * * *

(c) (1) Except as provided in paragraphs (2), (3), and (4), the corporation shall not pay benefits guaranteed under this subchapter with respect to a multiemployer plan which terminates before January 1, 1978. Whenever the corporation exercises the authority granted under paragraph (2) or (3), the corporation shall notify the Committee on Education and Labor and the Committee on Ways and Means of the House of Representatives, and the Committee on Labor and Public Welfare and the Committee on Finance of the Senate.

(2) the corporation may, in its discretion, pay benefits guaranteed under this subchapter with respect to a multiemployer plan which terminates after September 2, 1974, and before January 1, 1978, if—

(A) the plan was maintained during the 60 months immediately preceding the date on which the plan terminates, and

(B) the corporation determines that the payment by the corporation of benefits guaranteed under this subchapter with respect to that plan will not jeopardize the payments the corporation anticipates it may be required to make in connection with benefits guaranteed under this subchapter with respect to multiemployer plans which terminate after December 31, 1977.

29 U.S.C. (SUPP. V 1981)

§ 1001a. Additional Congressional findings and declaration of policy

(a) The Congress finds that—

(1) multiemployer pension plans have a substantial impact on interstate commerce and are affected with a national public interest;

(2) multiemployer pension plans have accounted for a substantial portion of the increase in private pension plan coverage over the past three decades;

(3) the continued well-being and security of millions of employees, retirees, and their dependents are directly affected by multiemployer pension plans; and

(4)(A) withdrawals of contributing employers from a multiemployer pension plan frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, adversely affecting the plan, its participants and beneficiaries, and labor-management relations, and

(B) in a declining industry, the incidence of employer withdrawals is higher and the adverse effects described in subparagraph (A) are exacerbated.

(b) The Congress further finds that—

(1) it is desirable to modify the current multiemployer plan termination insurance provisions in order to increase the likelihood of protecting plan participants against benefit losses; and

(2) it is desirable to replace the termination insurance program for multiemployer pension plans with an insolvency-based benefit protection program that will enhance the financial soundness of such

plans, place primary emphasis on plan continuation, and contain program costs within reasonable limits.

(c) It is hereby declared to be the policy of this Act—

(1) to foster and facilitate interstate commerce,

(2) to alleviate certain problems which tend to discourage the maintenance and growth of multiemployer pension plans,

(3) to provide reasonable protection for the interests of participants and beneficiaries of financially distressed multiemployer pension plans, and

(4) to provide a financially self-sufficient program for the guarantee of employee benefits under multiemployer plans.

§ 1082. Minimum funding standards

* * * *

(b) Funding standard account

(1) Each plan to which this part applies shall establish and maintain a funding standard account. Such account shall be credited and charged solely as provided in this section.

(2) For a plan year, the funding standard account shall be charged with the sum of—

(A) the normal cost of the plan for the plan year,

(B) the amounts necessary to amortize in equal annual installments (until fully amortized)—

(i) in the case of a plan in existence on January 1, 1974, the unfunded past service liability under the plan on the first day of the first plan year to which this part applies, over a period of 40 plan years,

(ii) in the case of a plan which comes into existence after January 1, 1974, the unfunded past service liability under the plan on the first day of the first plan year to which this part applies, over a period of 30 plan years,

(iii) separately, with respect to each plan year, the net increase (if any) in unfunded past service liability under the plan arising from plan amendments adopted in such year, over a period of 30 plan years,

(iv) separately, with respect to each plan year, the net experience loss (if any) under the plan, over a period of 15 plan years, and

* * * *

§ 1301. Definitions

(a) For purposes of this subchapter, the term—

(1) "administrator" means the person or persons described in paragraph (16) of section 1002 of this title;

(2) "substantial employer" means for any plan year an employer (treating employers who are members of the same affiliated group, within the meaning of section 1563(a) of Title 26, determined without regard to section 1563(a)(4) and (e)(3)(C) of Title 26, as one employer) who has made contributions to or under a plan under which more than one employer (other than a multiemployer plan) makes contributions for each of—

(A) the two immediately preceding plan years, or

(B) the second and third preceding plan years,

equaling or exceeding 10 percent of all employer contributions paid to or under that plan for each such year;

(3) "multiemployer plan" means a plan—

(A) to which more than one employer is required to contribute,

(B) which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer, and

(C) which satisfies such other requirements as the Secretary of Labor may prescribe by regulation,

except that, in applying this paragraph—

(i) a plan shall be considered a multiemployer plan on and after its termination date if the plan was a multiemployer plan under this paragraph for the plan year preceding such termination, and

(ii) for any plan year which began before September 26, 1980, the term "multiemployer plan" means a plan described in section 414(f) of Title 26 as in effect immediately before such date;

* * * *

(6) "basic benefits" means benefits guaranteed under section 1322 of this title (other than under section 1322(c) of this title), or under section 1322a of this title (other than under section 1322a(g) of this title);

(7) "non-basic benefits" means benefits guaranteed under section 1322(c) of this title or 1322a(g) of this title;

(8) "nonforfeitable benefit' means, with respect to a plan, a benefit for which a participant has satis-

fied the conditions for entitlement under the plan or the requirements of this chapter (other than submission of a formal application, retirement, completion of a required waiting period, or death in the case of a benefit which returns all or a portion of a participant's accumulated mandatory employee contributions upon the participant's death), whether or not the benefit may subsequently be reduced or suspended by a plan amendment, an occurrence of any condition, or operation of this chapter or Title 26;

(9) "reorganization index" means the amount determined under section 1421(b) of this title;

(10) "plan sponsor" means, with respect to a multiemployer plan—

(A) the plan's joint board of trustees, or

(B) if the plan has joint board of trustees, the plan administrator;

(11) "contribution base unit" means a unit with respect to which an employer has an obligation to contribute under a multiemployer plan, as defined in regulations prescribed by the Secretary of the Treasury; and

(12) "outstanding claim for withdrawal liability" means a plan's claim for the unpaid balance of the liability determined under part 1 of subtitle E of this subchapter for which demand has been made, valued in accordance with regulations prescribed by the corporation.

(b)(1) An individual who owns the entire interest in an unincorporated trade or business is treated as his own employer, and a partnership is treated as the employer of each partner who is an employee within the meaning of section 401(c)(1) of Title 26. For purposes of this subchapter, under regulations prescribed by the corporation, all employees of trades or businesses (whether or not in-

corporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer. The regulations prescribed under the preceding sentence shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under section 414(c) of Title 26.

(2) For purposes of this subchapter, "single-employer plan" means, except as otherwise specifically provided in this subchapter, any plan which is not a multiemployer plan.

* * * *

§ 1306. Premium rates

(a) Schedules for premium rates and bases for application; establishment, coverage, etc.

(1) The corporation shall prescribe such schedules of premium rates and bases for the application of those rates as may be necessary to provide sufficient revenue to the fund for the corporation to carry out its functions under this subchapter. The premium rates charged by the corporation for any period shall be uniform for all plans, other than multiemployer plans, insured by the corporation with respect to basic benefits guaranteed by it under section 1322 of this title, and shall be uniform for all multiemployer plans with respect to basic benefits guaranteed by it under section 1322a of this title. In establishing annual premiums with respect to plans, other than multiemployer plans, paragraphs (5) and (6) of this subsection (as in effect before September 26, 1980 shall continue to apply.

(2) The corporation shall maintain separate schedules of premium rates, and bases for the application of those rates, for—

(A) basic benefits guaranteed by it under section 1322 of this title for single-employer plans,

(B) basic benefits guaranteed by it under section 1322a of this title for multiemployer plans,

(C) nonbasic benefits guaranteed by it under section 1322 of this title for single-employer plans,

(D) nonbasic benefits guaranteed by it under section 1322a of this title for multiemployer plans, and

(E) reimbursements of uncollectible withdrawal liability under section 1402 of this title.

* * * *

(3)(A) Except as provided in subparagraph (C), the annual premium rate payable to the corporation by all plans for basic benefits guaranteed under this subchapter is—

(i) in the case of a single-employer plan, for plan years beginning after December 31, 1977, an amount equal to $2.60 for each individual who is a participant in such plan during the plan year;

(ii) in the case of a multiemployer plan, for the plan year within which the date of enactment of the Multiemployer Pension Plan Amendments Act of 1980 falls, an amount for each individual who is a participant in such plan for such plan year equal to the sum of—

(I) 50 cents, multiplied by a fraction the numerator of which is the number of months in such year ending on or before such date and the denominator of which is 12, and

(II) $1.00, multiplied by a fraction equal to 1 minus the fraction determined under clause (i).

(iii) in the case of a multiemployer plan, for plan years beginning after September 26, 1980, an amount equal to—

(I) $1.40 for each participant, for the first, second, third, and fourth plan years,

(II) $1.80 for each participant, for the fifth and sixth plan years.

(III) $2.20 for each participant, for the seventh and eighth plan years, and

(IV) $2.60 for each participant, for the ninth plan year, and for each succeeding plan year.

* * * *

(5) (A) In carrying out its authority under paragraph (1) to establish schedules of premium rates, and bases for the application of those rates, for nonbasic benefits guaranteed under sections 1322 and 1322a of this title the premium rates charged by the corporation for any period for nonbasic benefits guaranteed shall—

(i) be uniform by category of nonbasic benefits guaranteed,

(ii) be based on the risks insured in each category, and

(iii) reflect the experience of the corporation (including experience which may be reasonably anticipated) in guaranteeing such benefits.

* * * *

§ 1322a. Multiemployer plan benefits guaranteed

(a) Benefits of covered plans subject to guarantee

The corporation shall guarantee, in accordance with this section, the payment of all nonforfeitable benefits (other than benefits becoming nonforfeitable solely on account of the termination of a plan) under a multiemployer plan—

(1) to which section 1321 of this title applies, and

(2) which is insolvent under section 1426(b) or 1441(d)(2) of this title.

(b) Benefits or benefit increases not eligible for guarantee

(1) (A) For purposes of this section, a benefit or benefit increase which has been in effect under a plan for less than 60 months is not eligible for the corporation's guarantee. For purposes of this paragraph, any month of any plan year during which the plan was insolvent or terminated (within the meaning of section 1341a(a)(2) of this title) shall not be taken into account.

(B) For purposes of this section, a benefit or benefit increase which has been in effect under a plan for less than 60 months before the first day of the plan year for which an amendment reducing the benefit or the benefit increase is taken into account under section 1425(a)(2) of this title in determining the minimum contribution requirement for the plan year under section 1423(b) of this title is not eligible for the corporation's guarantee.

* * * *

(c) Determinations respecting amount of guarantee

(1) Except as provided in subsection (g) of this section, the monthly benefit of a participant or a beneficiary which is guaranteed under this section by the corporation with respect to a plan is the product of—

(A) 100 percent of the accrual rate up to $5, plus 75 percent of the lesser of—

(i) $15, or

(ii) the accrual rate, if any, in excess of $5, and

(B) the number of the participant's years of credited service.

(2) Except, as provided in paragraph (6) of this subsection and in subsection (g) of this section, in applying paragraph (1) with respect to a plan described in para-

graph (5) (A), the term "65 percent" shall be substituted in paragraph (1) (A) for the term "75 percent".

* * * *

§ 1322b. Aggregate limit on benefits guaranteed; criteria applicable

(a) Notwithstanding sections 1322 and 1322a of this title, no person shall receive from the corporation pursuant to a guarantee by the corporation of basic benefits with respect to a participant under all multiemployer and single employer plans an amount, or amounts, with an actuarial value which exceeds the actuarial value of a monthly benefit in the form of a life annuity commencing at age 65 equal to the amount determined under section 1322(b) (3) (B) of this title as of the date of the last plan termination.

(b) For purposes of this section—

(1) the receipt of benefits under a multiemployer plan receiving financial assistance from the corporation shall be considered the receipt of amounts from the corporation pursuant to a guarantee by the corporation of basic benefits except to the extent provided in regulations prescribed by the corporation, and

(2) the date on which a multiemployer plan, whether or not terminated, begins receiving financial assistance from the corporation shall be considered a date of plan termination.

§ 1361. Amounts payable by corporation

The corporation shall pay benefits under a single-employer plan terminated under this subchapter subject to the limitations and requirements of subtitle B of this subchapter. The corporation shall provide financial assistance to pay benefits under a multiemployer plan which is

insolvent under section 1426 or 1441(d)(2)(A) of this title, subject to the limitations and requirements of subtitles B, C, and E of this subchapter. Amounts guaranteed by the corporation under sections 1322 and 1322a of this title shall be paid by the corporation only out of the appropriate fund. The corporation shall make payments under the supplemental program to reimburse multiemployer plans for uncollectible withdrawal liability only out of the fund established under section 1305(e) of this title.

§ 1362. Liability of employer

(a) Employers covered

This section applies to any employer who maintained a single-employer plan at the time it was terminated, but does not apply—

* * * *

§ 1364. Liability of employers on termination of plan maintained by more than one employer

(a) This section applies to all employers who maintain a plan under which more than one employer makes contributions (other than a multiemployer plan) at the time such plan is terminated, or who, at any time within the 5 plan years preceding the date of termination, made contributions under the plan.

* * * *

§ 1381. Withdrawal liability established; criteria and definitions

(a) If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

(b) For purposes of subsection (a) of this section—

(1) The withdrawal liability of an employer to a plan is the amount determined under section 1391 of this title to be the allocable amount of unfunded vested benefits, adjusted—

(A) first, by any de minimis reduction applicable under section 1389 of this title,

(B) next, in the case of a partial withdrawal, in accordance with section 1386 of this title,

(C) then, to the extent necessary to reflect the limitation on annual payments under section 1399(c)(1)(B) of this title, and

(D) finally, in accordance with section 1405 of this title.

(2) The term "complete withdrawal" means a complete withdrawal described in section 1383 of this title.

(3) The term "partial withdrawal" means a partial withdrawal described in section 1385 of this title.

§ 1382. Determination and collection of liability; notification of employer

When an employer withdraws from a multiemployer plan, the plan sponsor, in accordance with this part, shall—

(1) determine the amount of the employer's withdrawal liability,

(2) notify the employer of the amount of the withdrawal liability, and

(3) collect the amount of the withdrawal liability from the employer.

§ 1383. Complete withdrawal

(a) Determinative factors

For purposes of this part, a complete withdrawal from a multiemployer plan occurs when an employer—

(1) permanently ceases to have an obligation to contribute under the plan, or

(2) permanently ceases all covered operations under the plan.

(b) Building and construction industry

(1) Notwithstanding subsection (a) of this section, in the case of an employer that has an obligation to contribute under a plan for work performed in the building and construction industry, a complete withdrawal occurs only as described in paragraph (2), if—

(A) substantially all the employees with respect to whom the employer has an obligation to contribute under the plan perform work in the building and construction industry, and

(B) the plan—

(i) primarily covers employees in the building and construction industry, or

(ii) is amended to provide that this subsection applies to employers described in this paragraph.

(2) A withdrawal occurs under this paragraph if—

(A) an employer ceases to have an obligation to contribute under the plan, and

(B) the employer—

(i) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or

(ii) resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption.

(3) In the case of a plan terminated by mass withdrawal (within the meaning of section 1341a(a)(2) of this title), paragraph (2) shall be applied by substituting "3 years" for "5 years" in subparagraph (B)(ii).

(c) Entertainment industry

(1) Notwithstanding subsection (a) of this section, in the case of an employer that has an obligation to contribute under a plan for work performed in the entertainment industry, primarily on a temporary or project-by-project basis, if the plan primarily covers employees in the entertainment industry, a complete withdrawal occurs only as described in subsection (b)(2) of this section applied by substituting "plan" for "collective bargaining agreement" in subparagraph (B)(i) thereof.

(2) For purposes of this subsection, the term "entertainment industry" means—

(A) theater, motion picture (except to the extent provided in regulations prescribed by the corporation), radio, television, sound or visual recording, music, and dance, and

(B) such other entertainment activities as the corporation may determine to be appropriate.

(3) The corporation may by regulation exclude a group or class of employers described in the preceding sentence from the application of this subsection if the corporation determines that such exclusion is necessary—

(A) to protect the interest of the plan's participants and beneficiaries, or

(B) to prevent a significant risk of loss to the corporation with respect to the plan.

(4) A plan may be amended to provide that this subsection shall not apply to a group or class of employers under the plan.

(d) Other determinative factors

(1) Notwithstanding subsection (a) of this section, in the case of an employer who—

(A) has an obligation to contribute under a plan described in paragraph (2) primarily for work described such paragraph, and

(B) does not continue to perform work within the jurisdiction of the plan, a complete withdrawal occurs only as described in paragraph (3).

(2) A plan is described in this paragraph if substantially all of the contributions required under the plan are made by employers primarily engaged in the long and short haul trucking industry, the household goods moving industry, or the public warehousing industry.

(3) A withdrawal occurs under this paragraph if—

(A) an employer permanently ceases to have an obligation to contribute under the plan or permanently ceases all covered operations under the plan, and

(B) either—

(i) the corporation determines that the plan has suffered substantial damage to its contribution base as a result of such cessation, or

(ii) the employer fails to furnish a bond issue by a corporate surety company that is an acceptable surety for purposes of section 1112 of this title, or an amount held in escrow by a bank or similar financial institution satisfactory to the plan, in an amount equal to 50 percent of the withdrawal liability of the employer.

(4) If, after an employer furnishes a bond or escrow to a plan under paragraph (3)(B)(ii), the corporation determines that the cessation of the employer's obligation to contribute under the plan (considered together with any cessations by other employers), or cessation of covered operations under the plan, has resulted in substantial damage to the contribution base of the plan, the employer shall be treated as having withdrawn from the plan on the date on which the obligation to contribute or covered operations ceased, and such bond or escrow shall be paid to the plan. The corporation shall not make a determination under this paragraph more than 60 months after the date on which such obligation to contribute or covered operations ceased.

(5) If the corporation determines that the employer has no further liability under the plan either—

(A) because it determines that the contribution base of the plan has not suffered substantial damage as a result of the cessation of the employer's obligation to contribute or cessation of covered operations (considered together with any cessation of contribution obligation, or of covered operations, with respect to other employers), or

(B) because it may not make a determination under paragraph (4) because of the last sentence thereof,

then the bond shall be cancelled or the escrow refunded.

(6) Nothing in this subsection shall be construed as a limitation on the amount of the withdrawal liability of any employer.

(e) Date of complete withdrawal

For the purposes of this part, the date of a complete withdrawal is the date of the cessation of the obligation to contribute or the cessation of covered operations.

(f) Special liability withdrawal rules for industries other than construction and entertainment industries; procedures applicable to amend plans

(1) The corporation may prescribe regulations under which plans in industries other than the construction or entertainment industries may be amended to provide for special withdrawal liability rules similar to the rules described in subsections (b) and (c) of this section.

(2) Regulations under paragraph (1) shall permit use of special withdrawal liability rules—

(A) only in industries (or portions thereof) in which, as determined by the corporation, the characteristics that would make use of such rules appropriate are clearly shown, and

(B) only if the corporation determines, in each instance in which special withdrawal liability rules are permitted, that use of such rules will not pose a significant risk to the corporation under this subchapter.

§ 1384. Sale of assets

(a) Complete or partial withdrawal not occurring as a result of sale and subsequent cessation of covered operations or cessation of obligation to contribute to covered operations; continuation of liability of seller

(1) A complete or partial withdrawal of an employer (hereinafter in this section referred to as the "seller") under this section does not occur solely because, as a result of a bona fide, arm's-length sale of assets to an unrelated party (hereinafter in this section referred to as the "purchaser"), the seller ceases covered operations or ceases to have an obligation to contribute for such operations, if—

(A) the purchaser has an obligation to contribute to the plan with respect to the operations for substantially the same number of contribution base units for which the seller had an obligation to contribute to the plan;

(B) the purchaser provides to the plan for a period of 5 plan years commencing with the first plan year beginning after the sale of assets, a bond issued by a corporate surety company that is an acceptable surety for purposes of section 1112 of this title, or an amount held in escrow by a bank or similar financial institution satisfactory to the plan, in an amount equal to the greater of—

(i) the average annual contribution required to be made by the seller with respect to the operations under the plan for the 3 plan years preceding the plan year in which the sale of the employer's assets occurs, or

(ii) the annual contribution that the seller was required to make with respect to the operations under the plan for the last plan year before the plan year in which the sale of the assets occurs,

which bond or escrow shall be paid to the plan if the purchaser withdraws from the plan, or fails to make a contribution to the plan when due, at any time during the first 5 plan years beginning after the sale; and

(C) the contract for sale provides that, if the purchaser withdraws in a complete withdrawal, or a partial withdrawal with respect to operations, during such first 5 plan years, the seller is secondarily liable for any withdrawal liability it would have had to the plan with respect to the operations (but for this section) if the liability of the purchaser with respect to the plan is not paid.

(2) If the purchaser—

(A) withdraws before the last day of the fifth plan year beginning after the sale, and

(B) fails to make any withdrawal liability payment when due,

then the seller shall pay to the plan an amount equal to the payment that would have been due from the seller but for this section.

(3) (A) If all, or substantially all, of the seller's assets are distributed, or if the seller is liquidated before the end of the 5 plan year period described in paragraph (1) (C), then the seller shall provide a bond or amount in escrow equal to the present value of the withdrawal liability the seller would have had but for this subsection.

(B) If only a portion of the seller's assets are distributed during such period, then a bond or escrow shall be required, in accordance with regulations prescribed by the corporation, in a manner consistent with subparagraph (A).

(4) The liability of the party furnishing a bond or escrow under this subsection shall be reduced, upon payment of the bond or escrow to the plan, by the amount thereof.

(b) Liability of purchaser

(1) For the purposes of this part, the liability of the purchaser shall be determined as if the purchaser had been required to contribute to the plan in the year of the sale and the 4 plan years preceding the sale the amount the seller was required to contribute for such operations for such 5 plan years.

(2) If the plan is in reorganization in the plan year in which the sale of assets occurs, the purchaser shall furnish a bond or escrow in an amount equal to 200 percent of the amount described in subsection (a) (1) (B) of this section.

(c) Variances or exemptions from continuation of liability of seller; procedures applicable

The corporation may by regulation vary the standards in subparagraphs (B) and (C) of subsection (a)(1) of this section if the variance would more effectively or equitably carry out the purposes of this subchapter. Before it promulgates such regulations, the corporation may grant individual or class variances or exemptions from the requirements of such subparagraphs if the particular case warrants it. Before granting such an individual or class variance or exemption, the corporation—

(1) shall publish notice in the Federal Register of the pendency of the variance or exemption,

(2) shall require that adequate notice be given to interested persons, and

(3) shall afford interested persons an opportunity to present their views.

(d) Definition

For purposes of this section, the term "unrelated party" means a purchaser or seller who does not bear a relationship to the seller or purchaser, as the case may be, that is described in section 267(b) of title 26, or that is described in regulations prescribed by the corporation applying principles similar to the principles of such section.

§ 1385. Partial withdrawals

(a) Determinative factors

Except as otherwise provided in this section, there is a partial withdrawal by an employer from a plan on the last day of a plan year if for such plan year—

(1) there is a 70-percent contribution decline, or

(2) there is a partial cessation of the employer's contribution obligation.

(b) Criteria applicable

For purposes of subsection (a) of this section—

(1) (A) There is a 70-percent contribution decline for any plan year if during each plan year in the 3-year testing period the employer's contribution base units do not exceed 30 percent of the employer's contribution base units for the high base year.

(B) For purposes of subparagraph (A)—

(i) The term "3-year testing period" means the period consisting of the plan year and the immediately preceding 2 plan years.

(ii) The number of contribution base units for the high base year is the average number of such units for the 2 plan years for which the employer's contribution base units were the highest within the 5 plan years immediately preceding the beginning of the 3-year testing period.

(2) (A) There is a partial cessation of the employer's contribution obligation for the plan year if, during such year—

(i) the employer permanently ceases to have an obligation to contribute under one or more but fewer than all collective bargaining agreements under which the employer has been obligated to contribute under the plan but continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required or transfers such work to another location, or

(ii) an employer permanently ceases to have an obligation to contribute under the plan with respect to work performed at one or more but fewer than all of its facilities, but continues to

perform work at the facility of the type for which the obligation to contribute ceased.

(B) For purposes of subparagraph (A), a cessation of obligations under a collective bargaining agreement shall not be considered to have occurred solely because, with respect to the same plan, one agreement that requires contributions to the plan has been substituted for another agreement.

(c) Retail food industry

(1) In the case of a plan in which a majority of the covered employees are employed in the retail food industry, the plan may be amended to provide that this section shall be applied with respect to such plan—

(A) by substituting "35 percent" for "70 percent" in subsections (a) and (b) of this section, and

(B) by substituting "65 percent" for "30 percent" in subsection (b) of this section.

(2) Any amendment adopted under paragraph (1) shall provide rules for the equitable reduction of withdrawal liability in any case in which the number of the plan's contribution base units, in the 2 plan years following the plan year of withdrawal of the employer, is higher than such number immediately after the withdrawal.

(3) Section 1388 of this title shall not apply to a plan which has been amended under paragraph (1).

(d) Continuation of liability of employer for partial withdrawal under amended plan

In the case of a plan described in section 404(c) of title 26, or a continuation thereof, the plan may be amended to provide rules setting forth other conditions consistent with the purposes of this chapter under which an employer has liability for partial withdrawal.

§ 1386. Adjustment for partial withdrawal; determination of amount; reduction for partial withdrawal liability; procedures applicable

(a) The amount of an employer's liability for a partial withdrawal, before the application of sections 1399(c)(1) and 1405 of this title, is equal to the product of—

(1) the amount determined under section 1391 of this title, and adjusted under section 1389 of this title if appropriate, determined as if the employer had withdrawn from the plan in a complete withdrawal—

(A) on the date of the partial withdrawal, or

(B) in the case of a partial withdrawal described in section 1385(a)(1) of this title (relating to 70-percent contribution decline), on the last day of the first plan year in the 3-year testing period,

multiplied by

(2) a fraction which is 1 minus a fraction—

(A) the numerator of which is the employer's contribution base units for the plan year following the plan year in which the partial withdrawal occurs, and

(B) the denominator of which is the average of the employer's contribution base units for—

(i) except as provided in clause (ii), the 5 plan years immediately preceding the plan year in which the partial withdrawal occurs, or

(ii) in the case of a partial withdrawal described in section 1385(a)(1) of this ti-

tle (relating to 70-percent contribution decline), the 5 plan years immediately preceding the beginning of the 3-year testing period.

(b)(1) In the case of an employer that has withdrawal liability for a partial withdrawal from a plan, any withdrawal liability of that employer for a partial or complete withdrawal from that plan in a subsequent plan year shall be reduced by the amount of any partial withdrawal liability (reduced by any abatement or reduction of such liability) of the employer with respect to the plan for a previous plan year.

(2) The corporation shall prescribe such regulations as may be necessary to provide for proper adjustments in the reduction provided by paragraph (1) for—

(A) changes in unfunded vested benefits arising after the close of the prior year for which partial withdrawal liability was determined,

(B) changes in contribution base units occurring after the close of the prior year for which partial withdrawal liability was determined, and

(C) any other factors for which it determined adjustment to be appropriate,

so that the liability for any complete or partial withdrawal in any subsequent year (after the application of the reduction) properly reflects the employer's share of liability with respect to the plan.

§ 1387. Reduction or waiver of complete withdrawal liability; procedures and standards applicable

(a) The corporation shall provide by regulation for the reduction or waiver of liability for a complete withdrawal in the event that an employer who has withdrawn from a plan subsequently resumes covered operations under the plan or renews an obligation to contribute un-

der the plan, to the extent that the corporation determines that reduction or waiver of withdrawal liability is consistent with the purposes of this chapter.

(b) The corporation shall prescribe by regulation a procedure and standards for the amendment of plans to provide alternative rules for the reduction or waiver of liability for a complete withdrawal in the event that an employer who has withdrawn from the plan subsequently resumes covered operations or renews an obligation to contribute under the plan. The rules may apply only to the extent that the rules are consistent with the purposes of this chapter.

§ 1388. Reduction of partial withdrawal liability

(a) Obligation of employer for payments for partial withdrawal for plan years beginning after the second consecutive plan year following the partial withdrawal year; criteria applicable; furnishing of bond in lieu of payment of partial withdrawal liability

(1) If, for any 2 consecutive plan years following the plan year in which an employer has partially withdrawn from a plan under section 1385(a)(1) of this title (referred to elsewhere in this section as the "partial withdrawal year"), the number of contribution base units with respect to which the employer has an obligation to contribute under the plan for each such year is not less than 90 percent of the total number of contribution base units with respect to which the employer had an obligation to contribute under the plan for the high base year (within the meaning of section 1385(b)(1)(B)(ii) of this title), then the employer shall have no obligation to make payments with respect to such partial withdrawal (other than delinquent payments) for plan years beginning after the second consecutive plan year following the partial withdrawal year.

(2)(A) For any plan year for which the number of contribution base units with respect to which an em-

ployer who has partially withdrawn under section 1385 (a)(1) of this title has an obligation to contribute under the plan equals or exceeds the number of units for the highest year determined under paragraph (1) without regard to "90 percent of", the employer may furnish (in lieu of payment of the partial withdrawal liability determined under section 1386 of this title) a bond to the plan in the amount determined by the plan sponsor (not exceeding 50 percent of the annual payment otherwise required).

(B) If the plan sponsor determines under paragraph (1) that the employer has no further liability to the plan for the partial withdrawal, then the bond shall be cancelled.

(C) If the plan sponsor determines under paragraph (1) that the employer continues to have liability to the plan for the partial withdrawal, then—

(i) the bond shall be paid to the plan,

(ii) the employer shall immediately be liable for the outstanding amount of liability due with respect to the plan year for which the bond was posted, and

(iii) the employer shall continue to make the partial withdrawal liability payments as they are due.

(b) Obligation of employer for payments for partial withdrawal for plan years beginning after the second consecutive plan year; other criteria applicable

If—

(1) for any 2 consecutive plan years following a partial withdrawal under section 1385(a)(1) of this title, the number of contribution base units with respect to which the employer has an obligation to contribute for each such year exceeds 30 percent of the total number of contribution base units with re-

spect to which the employer had an obligation to contribute for the high base year (within the meaning of section 1385(b)(1)(B)(ii) of this title,[1] and

(2) the total number of contribution base units with respect to which all employers under the plan have obligations to contribute in each of such 2 consecutive years is not less than 90 percent of the total number of contribution base units for which all employers had obligations to contribute in the partial withdrawal plan year;

then, the employer shall have no obligation to make payments with respect to such partial withdrawal (other than delinquent payments) for plan years beginning after the second such consecutive plan year.

(c) Pro rata reduction of amount of partial withdrawal liability payment of employer for plan year following partial withdrawal year

In any case in which, in any plan year following a partial withdrawal under section 1385(a)(1) of this title, the number of contribution base units with respect to which the employer has an obligation to contribute for such year equals or exceeds 110 percent (or such other percentage as the plan may provide by amendment and which is not prohibited under regulations prescribed by the corporation) of the number of contribution base units with respect to which the employer had an obligation to contribute in the partial withdrawal year, then the amount of the employer's partial withdrawal liability payment for such year shall be reduced pro rata, in accordance with regulations prescribed by the corporation.

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[1] So in original. Probably should be "title),".

(d) Building and construction industry; entertainment industry

(1) An employer to whom section 1383(b) of this title (relating to the building and construction industry) applies is liable for a partial withdrawal only if the employer's obligation to contribute under the plan is continued for no more than an insubstantial portion of its work in the craft and area jurisdiction of the collective bargaining agreement of the type for which contributions are required.

(2) An employer to whom section 1383(c) of this title (relating to the entertainment industry) applies shall have no liability for a partial withdrawal except under the conditions and to the extent prescribed by the corporation by regulation.

(e) Reduction or elimination of partial withdrawal liability under any conditions; criteria; procedures applicable

(1) The corporation may prescribe regulations providing for the reduction or elimination of partial withdrawal liability under any conditions with respect to which the corporation determines that reduction or elimination of partial withdrawal liability is consistent with the purposes of this chapter.

(2) Under such regulations, reduction of withdrawal liability shall be provided only with respect to subsequent changes in the employer's contributions for the same operations, or under the same collective bargaining agreement, that gave rise to the partial withdrawal, and changes in the employer's contribution base units with respect to other facilities or other collective bargaining agreements shall not be taken into account.

(3) The corporation shall prescribe by regulation a procedure by which a plan may by amendment adopt rules for the reduction or elimination of partial with-

drawal liability under any other conditions, subject to the approval of the corporation based on its determination that adoption of such rules by the plan is consistent with the purposes of this chapter.

§ 1389. De minimis rule

(a) Reductions of unfunded vested benefits allocable to employer withdrawn from plan

Except in the case of a plan amended under subsection (b) of this section, the amount of the unfunded vested benefits allocable under section 1391 of this title to an employer who withdraws from a plan shall be reduced by the smaller of—

(1) ¾ of 1 percent of the plan's unfunded vested obligations (determined as of the end of the plan year ending before the date of withdrawal), or

(2) $50,000,

reduced by the amount, if any, by which the unfunded vested benefits allowable to the employer, determined without regard to this subsection, exceeds $100,000.

(b) Amendment of plan for reduction of amount of unfunded vested benefits allocable to employer withdrawn from plan

A plan may be amended to provide for the reduction of the amount determined under section 1391 of this title by not more than the greater of—

(1) the amount determined under subsection (a) of this section, or

(2) the lesser of—

(A) the amount determined under subsection (a)(1) of this section, or

(B) $100,000,

reduced by the amount, if any, by which the amount determined under section 1391 of this title for the em-

ployer, determined without regard to this subsection, exceeds $150,000.

(c) Nonapplicability

This section does not apply—

(1) to an employer who withdraws in a plan year in which substantially all employers withdraw from the plan, or

(2) in any case in which substantially all employers withdraw from the plan during a period of one or more plan years pursuant to an agreement or arrangement to withdraw, to an employer who withdraws pursuant to such agreement or arrangement.

(d) Presumption of employer withdrawal from plan pursuant to agreement or arrangement applicable in action or proceeding to determine or collect withdrawal liability

In any action or proceeding to determine or collect withdrawal liability, if substantially all employers have withdrawn from a plan within a period of 3 plan years, an employer who has withdrawn from such plan during such period shall be presumed to have withdrawn from the plan pursuant to an agreement or arrangement, unless the employer proves otherwise by a preponderance of the evidence.

§ 1391. Methods for computing withdrawal liability

(a) Determination of amount of unfunded vested benefits allocable to employer withdrawn from plan

The amount of the unfunded vested benefits allocable to an employer that withdraws from a plan shall be determined in accordance with subsection (b), (c), or (d) of this section.

(b) Factors determining computation of amount of unfunded vested benefits allocable to employer withdrawn from plan

(1) Except as provided in subsections (c) and (d) of this section, the amount of unfunded vested benefits allocable to an employer that withdraws is the sum of—

(A) the employer's proportional share of the unamortized amount of the change in the plan's unfunded vested benefits for plan years ending after April 28, 1980, as determined under paragraph (2),

(B) the employer's proportional share, if any, of the unamortized amount of the plan's unfunded vested benefits at the end of the plan year ending before April 29, 1980, as determined under paragraph (3); and

(C) the employer's proportional share of the unamortized amounts of the reallocated unfunded vested benefits (if any) as determined under paragraph (4).

If the sum of the amounts determined with respect to an employer under paragraphs (2), (3), and (4) is negative, the unfunded vested benefits allocable to the employer shall be zero.

(2) (A) An employer's proportional share of the unamortized amount of the change in the plan's unfunded vested benefits for plan years ending after April 28, 1980, is the sum of the employer's proportional shares of the unamortized amount of the change in unfunded vested benefits for each plan year in which the employer has an obligation to contribute under the plan ending—

(i) after such date, and

(ii) before the plan year in which the withdrawal of the employer occurs.

(B) The change in a plan's unfunded vested benefits for a plan year is the amount by which—

(i) the unfunded vested benefits at the end of the plan year; exceeds

(ii) the sum of—

(I) the unamortized amount of the unfunded vested benefits for the last plan year ending before April 29, 1980, and

(II) the sum of the unamortized amounts of the change in unfunded vested benefits for each plan year ending after April 28, 1980, and preceding the plan year for which the change is determined.

(C) The unamortized amount of the change in a plan's unfunded vested benefits with respect to a plan year is the change in unfunded vested benefits for the plan year, reduced by 5 percent of such change for each succeeding plan year.

(D) The unamortized amount of the unfunded vested benefits for the last plan year ending before April 29, 1980, is the amount of the unfunded vested benefits as of the end of that plan year reduced by 5 percent of such amount for each succeeding plan year.

(E) An employer's proportional share of the unamortized amount of a change in unfunded vested benefits is the product of—

(i) the unamortized amount of such change (as of the end of the plan year preceding the plan year in which the employer withdraws); multiplied by

(ii) a fraction—

(I) the numerator of which is the sum of the contributions required to be made under the plan by the employer for the year in which such change arose and for the 4 preceding plan years, and

(II) the denominator of which is the sum for the plan year in which such change arose and the 4 preceding plan years of all contributions made by employers who had an obligation to contribute under the plan for the plan year in which such change arose reduced by the contributions made in such years by employers who had withdrawn from the plan in the year in which the change arose.

(3) An employer's proportional share of the unamortized amount of the plan's unfunded vested benefits for the last plan year ending before April 29, 1980, is the product of—

(A) such unamortized amount; multiplied by—

(B) a fraction—

(i) the numerator of which is the sum of all contributions required to be made by the employer under the plan for the most recent 5 plan years ending before April 29, 1980, and

(ii) the denominator of which is the sum of all contributions made for the most recent 5 plan years ending before April 29, 1980, by all employers—

(I) who had an obligation to contribute under the plan for the first plan year ending on or after such date, and

(II) who had not withdrawn from the plan before such date.

(4)(A) An employer's proportional share of the unamortized amount of the reallocated unfunded vested benefits is the sum of the employer's proportional share of the unamortized amount of the reallocated unfunded vested benefits for each plan year ending before the plan year in which the employer withdrew from the plan.

(B) Except as otherwise provided in regulations prescribed by the corporation, the reallocated unfunded vested benefits for a plan year is the sum of—

(i) any amount which the plan sponsor determines in that plan year to be uncollectible for reasons arising out of cases or proceedings under title 11, or similar proceedings.[2]

(ii) any amount which the plan sponsor determines in that plan year will not be assessed as a result of the operation of section 1389, 1399(c)(1)(B), or 1405 of this title against an employer to whom a notice described in section 1399 of this title has been sent, and

(iii) any amount which the plan sponsor determines to be uncollectible or unassessable in that plan year for other reasons under standards not inconsistent with regulations prescribed by the corporation.

(C) The unamortized amount of the reallocated unfunded vested benefits with respect to a plan year is the reallocated unfunded vested benefits for the plan year, reduced by 5 percent of such reallocated unfunded vested benefits for each succeeding plan year.

(D) An employer's proportional share of the unamortized amount of the reallocated unfunded vested benefits with respect to a plan year is the product of—

(i) the unamortized amount of the reallocated unfunded vested benefits (as of the end of the plan year preceding the plan year in which the employer withdraws); multiplied by

(ii) the fraction defined in paragraph (2)(E)(ii).

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[2] So in original. The period probably should be a comma.

(c) Amendment of multiemployer plan for determination respecting amount of unfunded vested benefits allocable to employer withdrawn from plan; factors determining computation of amount

(1) A multiemployer plan, other than a plan which primarily covers employees in the building and construction industry, may be amended to provide that the amount of unfunded vested benefits allocable to an employer that withdraws from the plan is an amount determined under paragraph (2), (3), (4), or (5) of this subsection, rather than under subsection (b) or (d) of this section. A plan described in section 1383(b)(1)(B)(i) of this title (relating to the building and construction industry) may be amended, to the extent provided in regulations prescribed by the corporation, to provide that the amount of the unfunded vested benefits allocable to an employer not described in section 1383(b)(1)(A) of this title shall be determined in a manner different from that provided in subsection (b) of this section.

* * * *

(e) Reduction of liability of withdrawn employer in case of transfer of liabilities to another plan incident to withdrawal or partial withdrawal of employer

In the case of a transfer of liabilities to another plan incident to an employer's withdrawal or partial withdrawal, the withdrawn employer's liability under this part shall be reduced in an amount equal to the value, as of the end of the last plan year ending on or before the date of the withdrawal, of the transferred unfunded vested benefits.

* * * *

§ 1392. Obligation to contribute

(a) Definition

For purposes of this part, the term "obligation to contribute" means an obligation to contribute arising—

(1) under one or more collective bargaining (or related) agreements, or

(2) as a result of a duty under applicable labor-management relations law, but does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions.

(b) Payments of withdrawal liability not considered contributions

Payments of withdrawal liability under this part shall not be considered contributions for purposes of this part.

(c) Transactions to evade or avoid liability

If a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction.

§ 1397. Application of part in case of certain pre-1980 withdrawals; adjustment of covered plan

(a) For the purpose of determining the amount of unfunded vested benefits allocable to an employer for a partial or complete withdrawal from a plan which occurs after April 28, 1980, and for the purpose of determining whether there has been a partial withdrawal after such date, the amount of contributions, and the number of contribution base units, of such employer properly allocable—

(1) to work performed under a collective bargaining agreement for which there was a permanent cessation of the obligation to contribute before April 29, 1980, or

(2) to work performed at a facility at which all covered operations permanently ceased before April

29, 1980, or for which there was a permanent cessation of the obligation to contribute before that date,

shall not be taken into account.

(b) A plan may, in a manner not inconsistent with regulations, which shall be prescribed by the corporation, adjust the amount of unfunded vested benefits allocable to other employers under a plan maintained by an employer described in subsection (a) of this section.

§ 1398. Withdrawal not to occur because of change in business form or suspension of contributions during labor dispute

Notwithstanding any other provision of this part, an employer shall not be considered to have withdrawn from a plan solely because—

(1) an employer ceases to exist by reason of—

(A) a change in corporate structure described in section 1362(d) of this title, or

(B) a change to an unincorporated form of business enterprise, if the change causes no interruption in employer contributions or obligations to contribute under the plan or,

(2) an employer suspends contributions under the plan during a labor dispute involving its employees.

For purposes of this part, a successor or parent corporation or other entity resulting from any such change shall be considered the original employer.

§ 1399. Notice, collection, etc., of withdrawal liability

(a) Furnishing of information by employer to plan sponsor

An employer shall, within 30 days after a written request from the plan sponsor, furnish such information as

the plan sponsor reasonably determines to be necessary to enable the plan sponsor to comply with the requirements of this part.

(b) Notification, demand for payment, and review upon complete or partial withdrawal by employer

(1) As soon as practicable after an employer's complete or partial withdrawal, the plan sponsor shall—

(A) notify the employer of—

(i) the amount of the liability, and

(ii) the schedule for liability payments, and

(B) demand payment in accordance with the schedule.

(2)(A) No later than 90 days after the employer receives the notice described in paragraph (1), the employer—

(i) may ask the plan sponsor to review any specific matter relating to the determination of the employer's liability and the schedule of payments,

(ii) may identify any inaccuracy in the determination of the amount of the unfunded vested benefits allocable to the employer, and

(iii) may furnish any additional relevant information to the plan sponsor.

(B) After a reasonable review of any matter raised, the plan sponsor shall notify the employer of—

(i) the plan sponsor's decision,

(ii) the basis for the decision, and

(iii) the reason for any change in the determination of the employer's liability or schedule of liability payments.

(c) Payment requirements; amount, etc.

(1) (A) (i) Except as provided in subparagraphs (B) and (D) of this paragraph and in paragraphs (4) and (5), an employer shall pay the amount determined under section 1391 of this title, adjusted if appropriate first under section 1389 of this title and then under section 1386 of this title over the period of years necessary to amortize the amount in level annual payments determined under subparagraph (C), calculated as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs and as if each subsequent payment were made on the first day of each subsequent plan year. Actual payment shall commence in accordance with paragraph (2).

(ii) The determination of the amortization period described in clause (i) shall be based on the assumptions used for the most recent actuarial valuation for the plan.

(B) In any case in which the amortization period described in subparagraph (A) exceeds 20 years, the employer's liability shall be limited to the first 20 annual payments determined under subparagraph (C).

(C) (i) Except as provided in subparagraph (E), the amount of each annual payment shall be the product of—

(I) the average annual number of contribution base units for the period of 3 consecutive plan years, during the period of 10 consecutive plan years ending before the plan year in which the withdrawal occurs, in which the number of contribution base units for which the employer had an obligation to contribute under the plan is the highest, and

(II) the highest contribution rate at which the employer had an obligation to contribute under the plan during the 10 plan years ending with the plan year in which the withdrawal occurs.

For purposes of the preceding sentence, a partial withdrawal described in section 1385(a)(1) of this title shall

be deemed to occur on the last day of the first year of the 3-year testing period described in section 1385(b)(1)(B)(i) of this title.

(ii)(I) A plan may be amended to provide that for any plan year ending before 1986 the amount of each annual payment shall be (in lieu of the amount determined under clause (i)) the average of the required employer contributions under the plan for the period of 3 consecutive plan years (during the period of 10 consecutive plan years ending with the plan year preceding the plan year in which the withdrawal occurs) for which such required contributions were the highest.

(II) Subparagraph (B) shall not apply to any plan year to which this clause applies.

(III) This clause shall not apply in the case of any withdrawal described in subparagraph (D).

(IV) If under a plan this clause applies to any plan year but does not apply to the next plan year, this clause shall not apply to any plan year after such next plan year.

(V) For purposes of this clause, the term "required contributions" means, for any period, the amounts which the employer was obligated to contribute for such period (not taking into account any delinquent contribution for any other period).

(iii) A plan may be amended to provide that for the first plan year ending on or after April 29, 1980, the number "5" shall be substituted for the number "10" each place it appears in clause (i) or clause (ii) (whichever is appropriate). If the plan is so amended, the number "5" shall be increased by one for each succeeding plan year until the number "10" is reached.

(D) In any case in which a multiemployer plan terminates by the withdrawal of every employer from the plan, or in which substantially all the employers withdraw

from a plan pursuant to an agreement or arrangement to withdraw from the plan—

(i) the liability of each such employer who has withdrawn shall be determined (or redetermined) under this paragraph without regard to subparagraph (B), and

(ii) notwithstanding any other provision of this part, the total unfunded vested benefits of the plan shall be fully allocated among all such employers in a manner not inconsistent with regulations which shall be prescribed by the corporation.

Withdrawal by an employer from a plan, during a period of 3 consecutive plan years within which substantially all the employers who have an obligation to contribute under the plan withdraw, shall be presumed to be a withdrawal pursuant to an agreement or arrangement, unless the employer proves otherwise by a preponderance of the evidence.

(E) In the case of a partial withdrawal described in section 1385(a) of this title, the amount of each annual payment shall be the product of—

(i) the amount determined under subparagraph (C) (determined without regard to this subparagraph), multiplied by

(ii) the fraction determined under section 1386 (a)(2) of this title.

(2) Withdrawal liability shall be payable in accordance with the schedule set forth by the plan sponsor under subsection (b)(1) of this section beginning no later than 60 days after the date of the demand notwithstanding any request for review or appeal of determinations of the amount of such liability or of the schedule.

(3) Each annual payment determined under paragraph (1)(C) shall be payable in 4 equal installments due

quarterly, or at other intervals specified by plan rules. If a payment is not made when due, interest on the payment shall accrue from the due date until the date on which the payment is made.

(4) The employer shall be entitled to prepay the outstanding amount of the unpaid annual withdrawal liability payments determined under paragraph (1)(C), plus accrued interest, if any, in whole or in part, without penalty. If the prepayment is made pursuant to a withdrawal which is later determined to be part of a withdrawal described in paragraph (1)(D), the withdrawal liability of the employer shall not be limited to the amount of the prepayment.

(5) In the event of a default, a plan sponsor may require immediate payment of the outstanding amount of an employer's withdrawal liability, plus accrued interest on the total outstanding liability from the due date of the first payment which was not timely made. For purposes of this section, the term "default" means—

(A) the failure of an employer to make, when due, any payment under this section, if the failure is not cured within 60 days after the employer receives written notification from the plan sponsor of such failure, and

(B) any other event defined in rules adopted by the plan which indicates a substantial likelihood that an employer will be unable to pay its withdrawal liability.

* * * *

§ 1401. Resolution of disputes

(a) Arbitration proceedings; matters subject to arbitration, procedures applicable, etc.

(1) Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determina-

tion made under sections 1381 through 1399 of this title shall be resolved through arbitration. Either party may initiate the arbitration proceeding within a 60-day period after the earlier of—

(A) the date of notification to the employer under section 1399(b)(2)(B) of this title, or

(B) 120 days after the date of the employer's request under section 1399(b)(2)(A) of this title.

The parties may jointly initiate arbitration within the 180-day period after the date of the plan sponsor's demand under section 1399(b)(1) of this title.

(2) An arbitration proceeding under this section shall be conducted in accordance with fair and equitable procedures to be promulgated by the corporation. The plan sponsor may purchase insurance to cover potential liability of the arbitrator. If the parties have not provided for the costs of the arbitration, including arbitrator's fees, by agreement, the arbitrator shall assess such fees. The arbitrator may also award reasonable attorney's fees.

(3)(A) For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 1381 through 1399 of this title and section 1405 of this title is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.

(B) In the case of the determination of a plan's unfunded vested benefits for a plan year, the determination is presumed correct unless a party contesting the determination shows by a preponderance of evidence that —

(i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or

(ii) the plan's actuary made a significant error in applying the actuarial assumptions or methods.

(b). Alternative collection proceedings; civil action subsequent to arbitration award; conduct of arbitration proceedings

(1) If no arbitration proceeding has been initiated pursuant to subsection (a) of this section, the amounts demanded by the plan sponsor under section 1399(b)(1) of this title shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection.

(2) Upon completion of the arbitration proceedings in favor of one of the parties, any party thereto may bring an action, no later than 30 days after the issuance of an arbitrator's award, in an appropriate United States district court in accordance with section 1451 of this title to enforce, vacate, or modify the arbitrator's award.

(3) Any arbitration proceedings under this section shall, to the extent consistent with this subchapter, be conducted in the same manner, subject to the same limitations, carried out with the same powers (including subpoena power), and enforced in United States courts as an arbitration proceeding carried out under Title 9.

(c) Presumption respecting finding of fact by arbitrator

In any proceeding under subsection (b) of this section, there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct.

(d) Payments by employer prior and subsequent to determination by arbitrator; adjustments; failure of employer to make payments

Payments shall be made by an employer in accordance with the determinations made under this part until the arbitrator issues a final decision with respect to the determination submitted for arbitration, with any necessary adjustments in subsequent payments for overpayments or underpayments arising out of the decision of the arbitrator with respect to the determination. If the employer fails to make timely payment in accordance with such final decision, the employer shall be treated as being delinquent in the making of a contribution required under the plan (within the meaning of section 1145 of this title.

(e) Furnishing of information by plan sponsor to employer respecting computation of withdrawal liability of employer; fees

If any employer requests in writing that the plan sponsor make available to the employer general information necessary for the employer to compute its withdrawal liability with respect to the plan (other than information which is unique to that employer), the plan sponsor shall furnish the information to the employer without charge. If any employer requests in writing that the plan sponsor make an estimate of such employer's potential withdrawal liability with respect to the plan or to provide information unique to that employer, the plan sponsor may require the employer to pay the reasonable cost of making such estimate or providing such information.

§ 1404. Alternative method of withdrawal liability payments

A multiemployer plan may adopt rules providing for other terms and conditions for the satisfaction of an employer's withdrawal liability if such rules are consistent with this chapter and with such regulations as may be prescribed by the corporation.

§ 1405. Limitation on withdrawal liability

(a) Unfunded vested benefits allocable to employers in bona fide sale of assets of employer in arms-length transaction to unrelated party; maximum amount; determinative factors

(1) In the case of bona fide sale of all or substantially all of the employer's assets in an arm's-length transaction to an unrelated party (within the meaning of section 1384(d) of this title), the unfunded vested benefits allocable to an employer (after the application of all sections of this part having a lower number designation than this section), other than an employer undergoing reorganization under Title 11, or similar provisions of State law, shall not exceed the greater of—

(A) a portion (determined under paragraph (2)) of the liquidation or dissolution value of the employer (determined after the sale or exchange of such assets), or

(B) the unfunded vested benefits attributable to employees of the employer.

(2) For purposes of paragraph (1), the portion shall be determined in accordance with the following table:

If the liquidation or dissolution value of the employer after the sale or exchange is—	The portion is—
Not more than $2,000,000	30 percent of the amount.
More than $2,000,000, but not more than $4,000,000.	$600,000, plus 35 percent of the amount in excess of $2,000,000.
More than $4,000,000, but not more than $6,000,000.	$1,300,000, plus 40 percent of the amount in excess of $4,000,000.
More than $6,000,000, but not more than $7,000,000.	$2,100,000, plus 45 percent of the amount in excess of $6,000,000.
More than $7,000,000, but not more than $8,000,000.	$2,550,000, plus 50 percent of the amount in excess of $7,000,000.
More than $8,000,000, but not more than $9,000,000.	$3,050,000, plus 60 percent of the amount in excess of $8,000,000.
More than $9,000,000, but not more than $10,000,000.	$3,650,000, plus 70 percent of the amount in excess of $9,000,000.
More than $10,000,000	$4,350,000, plus 80 percent of the amount in excess of $10,000,000.

(b) Unfunded vested benefits allocable to insolvent employer undergoing liquidation or dissolution; maximum amount; determinative factors

In the case of an insolvent employer undergoing liquidation or dissolution, the unfunded vested benefits allocable to that employer shall not exceed an amount equal to the sum of—

(1) 50 percent of the unfunded vested benefits allocable to the employer (determined without regard to this section), and

(2) that portion of 50 percent of the unfunded vested benefits allocable to the employer (as determined under paragraph (1)) which does not exceed the liquidation or dissolution value of the employer determined—

(A) as of the commencement of liquidation or dissolution, and

(B) after reducing the liquidation or dissolution value of the employer by the amount determined under paragraph (1).

(c) Property not subject to enforcement of liability; precondition

To the extent that the withdrawal liability of an employer is attributable to his obligation to contribute to or under a plan as an individual (whether as a sole proprietor or as a member of a partnership), property which may be exempt from the estate under section 522 of title 11, or under similar provisions of law, shall not be subject to enforcement of such liability.

(d) Insolvency of employer; liquidation or dissolution value of employer

For purposes of this section—

(1) an employer is insolvent if the liabilities of the employer, including withdrawal liability under

the plan (determined without regard to subsection (b) of this section), exceed the assets of the employer (determined as of the commencement of the liquidation or dissolution), and

(2) the liquidation or dissolution value of the employer shall be determined without regard to such withdrawal liability.

(e) One or more withdrawals of employer attributable to same sale, liquidation, or dissolution

In the case of one or more withdrawals of an employer attributable to the same sale, liquidation, or dissolution, under regulations prescribed by the corporation—

(1) all such withdrawals shall be treated as a single withdrawal for the purpose of applying this section, and

(2) the withdrawal liability of the employer to each plan shall be an amount which bears the same ratio to the present value of the withdrawal liability payments to all plans (after the application of the preceding provisions of this section) as the withdrawal liability of the employer to such plan (determined without regard to this section) bears to the withdrawal liability of the employer to all such plans (determined without regard to this section).

§ 1425. Adjustments in accrued benefits

(a) Amendment of multiemployer plan in reorganization to reduce or eliminate accrued benefits attributable to employer contributions ineligible for guarantee of corporation; adjustment of vested benefits charge to reflect plan amendment

(1) Notwithstanding sections 1053 and 1054 of this title, a multiemployer plan in reorganization may be

amended in accordance with this section, to reduce or eliminate accrued benefits attributable to employer contributions which, under section 1322a(b) of this title, are not eligible for the corporation's guarantee. The preceding sentence shall only apply to accrued benefits under plan amendments (or plans) adopted after March 26, 1980, or under collective bargaining agreements entered into after March 26, 1980.

(2) In determining the minimum contribution requirement with respect to a plan for a plan year under section 1423(b) of this title, the vested benefits charge may be adjusted to reflect a plan amendment reducing benefits under this section or section 412(c)(8) of title 26, but only if the amendment is adopted and effective no later than 2½ months after the end of the plan year, or within such extended period as the Secretary of the Treasury may prescribe by regulation under section 412 (c)(10) of title 26.

* * * *

§ 1426. Insolvent plans

(a) Suspension of payments of benefits; conditions, amount, etc.

Notwithstanding sections 1053 and 1054 of this title, in any case in which benefit payments under an insolvent multiemployer plan exceed the resource benefit level, any such payments of benefits which are not basic benefits shall be suspended, in accordance with this section, to the extent necessary to reduce the sum of such payments and the payments of such basic benefits to the greater of the resource benefit level or the level of basic benefits, unless an alternative procedure is prescribed by the corporation under section 1322a(g)(5) of this title.

* * * *

§ 1431. Assistance by corporation

(a) Authority; procedure applicable; amount

If, upon receipt of an application for financial assistance under section 1426(f) of this title or section 1441(d) of this title, the corporation verifies that the plan is or will be insolvent and unable to pay basic benefits when due, the corporation shall provide the plan financial assistance in an amount sufficient to enable the plan to pay basic benefits under the plan.

(b) Conditions; repayment terms

(1) Financial assistance shall be provided under such conditions as the corporation determines are equitable and are appropriate to prevent unreasonable loss to the corporation with respect to the plan.

(2) A plan which has received financial assistance shall repay the amount of such assistance to the corporation on reasonable terms consistent with regulations prescribed by the corporation.

(c) Assistance pending final determination of application

Pending determination of the amount described in subsection (a) of this section, the corporation may provide financial assistance in such amounts as it considers appropriate in order to avoid undue hardship to plan participants and beneficiaries.

§ 1451. Civil actions

(a) Persons entitled to maintain actions

(1) A plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for pur-

poses of collective bargaining, may bring an action for appropriate legal or equitable relief, or both.

(2) Notwithstanding paragraph (1), this section does not authorize an action against the Secretary of the Treasury, the Secretary of Labor, or the corporation.

(b) Failure of employer to make withdrawal liability payment within prescribed time

In any action under this section to compel an employer to pay withdrawal liability, any failure of the employer to make any withdrawal liability payment within the time prescribed shall be treated in the same manner as a delinquent contribution (within the meaning of section 1145 of this title).

(c) Jurisdiction of Federal and State courts

The district courts of the United States shall have exclusive jurisdiction of an action under this section without regard to the amount in controversy, except that State courts of competent jurisdiction shall have concurrent jurisdiction over an action brought by a plan fiduciary to collect withdrawal liability.

(d) Venue and service of process

An action under this section may be brought in the district where the plan is administered or where a defendant resides or does business, and process may be served in any district where a defendant resides, does business, or may be found.

(e) Costs and expenses

In any action under this section, the court may award all or a portion of the costs and expenses incurred in connection with such action, including reasonable attorney's fees, to the prevailing party.

(f) Time limitations

An action under this section may not be brought after the later of—

(1) 6 years after the date on which the cause of action arose, or

(2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action.

(g) Service of complaint on corporation; intervention by corporation

A copy of the complaint in any action under this section or section 1401 of this title shall be served upon the corporation by certified mail. The corporation may intervene in any such action.

§ 1461. Effective date; special rules

* * * *

(e)(1) Except as provided in paragraphs (2), (3), and (4), the amendments to this chapter made by the Multiemployer Pension Plan Amendments Act of 1980 shall take effect on September 26, 1980.

(2)(A) Except as provided in this paragraph, part 1 of subtitle E of this subchapter, relating to withdrawal liability, takes effect on April 29, 1980.

PUBLIC LAW 95-214 [91 Stat. 1501]; Dec. 19, 1977 EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

An Act to amend title IV of the Employee Retirement Income Security Act of 1974 to postpone, for two years, the date on which the corporation first begins paying benefits under terminated multiemployer plans.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) section 4082(c) of the Employee Retirement Income Security Act of 1974 (relating to effective dates; special rules) is amended—

(1) by striking, "January 1, 1978" in paragraph (1) and substituting "July 1, 1979";

(2) by striking "January 1, 1978" in paragraph (2) and substituting "July 1, 1979";

(3) by striking "December 31, 1977" in paragraph (2)(B) and substituting "June 30, 1979";

(4) by striking "January 1, 1978" in paragraph (4) and substituting "July 1, 1979";

(5) by striking "December 31, 1977" in paragraph (4)(D) and substituting "June 30, 1979".

(b) Section 4082 of such Act is amended by adding at the end thereof the following new subsections:

"(d) The corporation shall present to the Committee on Education and Labor of the House of Representatives and the Committee on Human Resources and the Committee on Finance of the Senate a report which comprehensively addresses the anticipated financial condition of the program relating to mandatory coverage of multiemployer plans, including possible events which might cause the corporation to experience serious financial difficulty after July 1, 1979. Such report shall include an

explanation of any alternative courses of action which might be taken by the corporation to insure proper coverage of multiemployer plans and the proper financing of the program relating to such plans. If the report contains recommendations for amendments to this title, such recommendations shall be fully explained, and shall be accompanied by explanations of other options for legislative change considered and rejected by the corporation. The report shall be presented by July 1, 1978.

PUBLIC LAW 96-24 [93 Stat. 70]; June 19, 1979 EMPLOYMENT RETIREMENT INCOME SECURITIES ACT OF 1974

An Act to amend title IV of the Employee Retirement Income Security Act of 1974 to postpone for 10 months the date on which the corporation must pay benefits under terminated multiemployer plans.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 4082(c) of title IV of the Employee Retirement Income Security Act of 1974 (relating to effective dates; special rules) as amended by Public Law 95-214, is further amended—

(1) by striking "July 1, 1979" in paragraphs (1),

(2) and (4) and substituting "May 1, 1980" in each such paragraph; and

(2) by striking "June 30, 1979" in paragraphs 2(B) and 4(D) and substituting "April 30, 1980" in each such paragraph.

Approved June 19, 1979.

PUBLIC LAW 96-239 [94 Stat. 341]; April 30, 1980
EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974—BENEFITS

An Act to amend title IV of the Employee Retirement Income Security Act of 1974 to postpone for two months the date on which the Pension Benefit Guaranty Corporation must pay benefits under terminated multiemployer plans.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 4082(c) of title IV of the Employee Retirement Income Security Act of 1974 (relating to effective dates; special rules) as amended by Public Law 95-214 and Public Law 96-24, is further amended—

(1) by striking "May 1, 1980" in paragraphs (1), (2), and (4) and substituting "July 1, 1980" in each such paragraph; and

(2) by striking "April 30, 1980" in paragraphs 2(B) and 4(D) and substituting "June 30, 1980" in each such paragraph.

Approved April 30, 1980.

PUBLIC LAW 96-293 [94 Stat. 610]; June 30, 1980
EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

An Act to amend title IV of the Employee Retirement Income Security Act of 1974 to postpone for one month the date on which the corporation must pay benefits under terminated multiemployer plans.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 4082(c) of title IV of the Employee Retirement Income Security Act of 1974 (relating to effective dates; special rules) as amended by Public Law 95-214, Public Law 96-24, and Public Law 96-239 is further amended—

(1) by striking "July 1, 1980" in paragraphs (1), (2), and (4) and substituting "August 1, 1980" in each such paragraph; and

(2) by striking "June 30, 1980" in paragraphs 2(B) and 4(D) and substituting "July 31, 1980" in each such paragraph.

Approved June 30, 1980.